IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

JURISDICTIONAL STATEMENT FOR APPELLANTS

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Appellees.

JURISDICTIONAL STATEMENT FOR APPELLANTS

Appellants appeal from a judgment and order of the United States District Court for the Southern District of New York (statutory three-judge court), entered July 18, 1975 declaring Section 6811(8) of the New York Education Law unconstitutional and enjoining its enforcement.*

* On August 1, 1975, Justice Marshall denied appellants' request for a stay of this judgment.

Opinions Below

The opinion of the single district judge granting the motion to convene a three judge court, dated October 23, 1974, is reported at 383 F. Supp. 543. The opinion of the three judge court dated July 2, 1975 is unreported and is reproduced herein as Appendix A.

Jurisdiction

The judgment of the three judge court was entered on July 18, 1975. The notice of appeal was filed on July 24, 1975 and is reproduced herein as Appendix B.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statute Involved

New York State Education Law § 6811(8)

"It shall be a class A misdemeanor for:

* * *

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited."

Questions Presented

(1) Did the District Court correctly conclude that appellees PPA and Hagen had standing to challenge New York Education Law § 6811 (8)?

(2) May a State statute provide that only licensed physicians may sell or distribute contraceptives to minors under sixteen and only licensed pharmacists or physicians may sell or distribute such products to persons sixteen years or older?

(3) Is a State statute which proscribes advertisement and display of contraceptive products overbroad where such statute defines advertisement as a representation other than a label which directly or indirectly induces their purchase and where such statute has been consistently applied to purely commercial advertisement and display?

Statement of the Case

The Statute

Section 6811(8) of the New York Education Law was enacted in its present form in 1965.* Although in recent years various legislators have sought to alter its provisions in one way or another, see New York Legislative Record and Index for 1974, A6843-B, New York State Legislative Record and Index for 1973, S3067-A4368, S74-S3068-A4369, A1820, and S77-S3049-A4371; New York State Legislative Record for 1972, S2181B, the New York Legislature has continued to reaffirm its belief that Section 6811(8) is a proper exercise of the State's police power and necessary and important legislation.

During debate on Assembly Bill 6843-B on April 18, 1974,** legislators expressed their concern that a repeal of the provisions prohibiting contraceptive displays in pharmacies would be detrimental to the youth of New

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* This statute originally appeared as Section 1142 of the New York Penal Law. It was repealed from the Penal Law and enacted into the Education Law as § 6804-b. In 1971, it became § 6811(8) of the Education Law.

** A Transcript of a debate in the New York Assembly on Assembly Bill 6843-B on April 18, 1974 and in the New York Senate on Senate Bill 2181-B on April 17, 1972 was submitted to the District Court.

York and increase, add to, or cause a promiscuous society (Assemblyman Greene); expose children to contraceptive displays when they go into drugstores which frequently sell, among other things candy (Assemblyman Mannix); lead to all kinds of advertising slogans (Assemblyman Guzzara), expose clerks in supermarkets, frequently young girls, to undesirable comments and gestures (Assemblywoman Connelly); be permission for the young people of the State to go out and be permissive (Assemblyman Eposito) and would interfere with the responsibility of parents for educating their children (Assemblyman Nicolosi).

In short, the legislators expressed concern that advertisement and displays of contraceptive products would be offensive and embarrassing to many and would legitimize sexual activity by the young citizens of their State.*

The Appellees and their Claims

Plaintiff Population Services International alleged that it is a nonprofit corporation whose primary objective is to discover and implement new methods of conveying birth control information and services to persons not now receiving them. It alleged that its activities include the test marketing of contraceptive products and advertisement of

* Various states have statutes restricting the sale or distribution of contraceptive products generally or prophylactics specifically. Arkansas, Colorado, Idaho, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oregon, Tennessee (City of Knoxville), Texas, Utah, Wisconsin, Virginia, and the District of Columbia, limit their sale by a licensed pharmacist or druggist (physicians are usually exempted from the operation of these provisions). Additionally, at least twenty-one states restrict the advertisement and/or display of all or some contraceptive devices. Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Montana, New Jersey, Oregon, Pennsylvania, South Dakota, Utah, West Virginia, Wisconsin and Wyoming. For a more detailed survey and study, see *Family Planning and Analysis of Laws and Policies in the United States*, Report of the National Center for Family Planning Services DHEW publication.

contraceptive products in the United States including New York State.

Dr. Anna T. Rand, Dr. Edward Elkin and Dr. Charles Arnold alleged that they are physicians licensed to practice medicine in New York State who treat sexually active patients under the age of sixteen.

Plaintiff Hagen alleged that he is an ordained minister of the Protestant Episcopal Church and that he is the coordinator of the Sunset Action Group against V.D. which sponsors a program in which male contraceptive devices are sold and distributed to local residents both over and under the age of sixteen at the church and at a local retail store which is not a licensed pharmacy.

John Doe alleged that he is forty-three years of age, that he is married and the father of four children, that he engages actively in sexual conduct and that he lives two miles from his nearest licensed pharmacist.

Population Planning Associates (PPA) alleged it is a North Carolina business corporation which maintains an office in New York City. It engages primarily in the retail sale of non-medical contraceptives through the United States mails. PPA advertises its products in national periodicals entering New York State and, from time to time, places advertisements for its products in local periodicals in New York State. PPA alleged that in December 1971, over two and a half years before appellees instituted their suit, it received a letter from appellant Sica, Executive Secretary of the Board of Pharmacy of the State of New York, advising PPA that an advertisement for the sale of condoms in an issue of the Utica College Tangerine was in violation of the Education Law. Approximately one and a half years before the complaint herein, it received a letter written on behalf of appellant Sica advising PPA that the sale of contraceptives to minors under the age of sixteen was prohibited, that sales of contraceptives were

limited to licensed pharmacists and that if PPA failed to comply with the statute, the matter would be referred to the New York State Attorney General. In a supplemental complaint, PPA further alleged that on September 4, 1974 two inspectors from the State Board of Pharmacy threatened legal action if it did not discontinue an advertisement appearing in the September 1974 issue of *Playgirl* magazine which solicited sales of nonprescription contraceptives.

Appellees attacked Section 6811(8) insofar as it applied to nonprescription contraceptives under 42 U.S.C. § 1983 on the grounds, *inter alia*, that it violated the constitutional right of privacy of New York State residents, including minors under the age of sixteen, which embraces a fundamental constitutional right to have nonprescription contraceptives advertised, displayed and sold without any State regulation.

Alternatively, plaintiffs argued that the restriction on advertisement and display violated the First Amendment rights of New York State residents to receive information concerning such products as well as plaintiffs' own right to dispense such information.

The Opinion of the District Court

The District Court examined the standing of the various appellees. The Court held that plaintiffs PPA and Hagen had standing to challenge § 6818(8) and accordingly did not reach the issue of the standing of the remaining appellees.* The Court then turned to the merits of the action and considered plaintiffs' claim that the right of privacy encompasses the right to have access to nonprescription contraceptives and held that access to contraceptives is an aspect of the right of privacy encompassed within the personal liberty protected by the due process clause of the Fourteenth Amendment. The Court did not decide that this particular aspect of the right of privacy was "fundamental" but nonetheless scrutinized the three provisions of § 6811(8) to determine whether as drafted, they were, in fact, sufficiently related to a legitimate State interest to justify infringement of the right at stake, the standard adopted by the Second Circuit in *Boraas* v. *Village of Belle Terre*, 476 F. 2d 806 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974).

Insofar as Section 6811(8) required that minors fifteen years and younger obtain nonprescription contraceptives from licensed physicians, the District Court, while purporting to recognize that issues relating to sexual intercourse by minors below a certain age are matters with which the State may be legitimately concerned, held that the State had failed to prove that Section 6811(8) was substantially related to the State's goal of determining sexual activities by minors under sixteen.

As for the prohibition of sale or distribution by anyone other than a licensed pharmacist, the Court concluded that even if the State had some legitimate interest in imposing some regulations on advertising and display of nonprescription contraceptives and in limiting, to some extent, the persons to whom such products may be sold, facilitating administrative enforcement of these regulations was not sufficient to justify the limitation which it

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* Victor J. D'Amico, an inspector with the New York State Board of Pharmacy, submitted an affidavit to the District Court which stated that this visit was for informational gathering purposes only and that no legal action was threatened.

* Appellants disputed the standing of the appellees to maintain this lawsuit on various grounds. Dr. Rand, Dr. Elkin and Dr. Arnold were exempted from the provisions of § 6811(8) by § 6807 (1)(b) which permits a physician to supply his patients with such drugs as he deems proper in connection with his practice. John Doe was never identified and thus the truth of his allegations was unascertainable. PSI failed to allege any threat of prosecution.

(footnote continued on following page)

(footnote continued from preceding page)

placed on the right of access to nonprescription contraceptives, i.e., by making them available only from a licensed pharmacist or a physician.

With regard to so much of Section 6811(8) as prohibited advertisement and display, the District Court sidestepped the appellees' argument that this provision unconstitutionally burdened the right of access to contraceptives and, instead, treated the claim under the First Amendment. The District Court concluded that the State's bar on advertisement and display was facially overbroad since it could reach "public interest" and mixed, as well as purely commercial advertising and display.*

ARGUMENT

This appeal presents substantial questions of law requiring reversal by this Court of the decision below.

A. The District Court erroneously concluded that plaintiffs Hagen and PPA had standing to maintain this action.

It is well established that federal courts will not render advisory opinions and that the existence of an actual controversy is pre-requisite to the adjudication of Constitutional issues. *Golden* v. *Zwickler,* 394 U.S. 103 (1969). Among the facts which are necessary to show the existence of an actual controversy where a state criminal statute is involved is the "imminence and immediacy of proposed enforcement." *Watson* v. *Buck,* 313 U.S. 387 (1941) at 400.

Plaintiff PPA as well as the Reverend Hagen have utterly failed to allege any prosecutions under Section 6811 (8) and their position is thus almost identical to plaintiffs in *Poe* v. *Ullman,* 367 U.S. 497 (1961), where the Court found a lack of a case or controversy. "The fact that

* The Court stayed injunctive relief against enforcement of the provisions which prohibited sales by any person other than a licensed pharmacist and prohibited advertising and display for 120 days following entry of its judgment to give the State Legislature an opportunity to draft narrower provisions.

Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication". *Id.* at 508.

The District Court's reliance on *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) and *Doe* v. *Bolton,* 419 U.S. 179 (1973) is thus misplaced.

In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), the appellants were *convicted* as accessories under a Connecticut law forbidding the use of contraceptive devices. Similarly, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), the appellee had been *convicted* under a Massachusetts statute limiting the distribution of contraceptives to married persons by a physician or pharmacist on prescription from a registered physician. Moreover, although standing was found to exist in *Doe* v. *Bolton,* 410 U.S. 179 (1973), where the state statute at issue had not been enforced against the parties bringing suit, such standing was based on the fact that previous prosecutions under those statutes demonstrated that the fear of prosecution was not "chimerical".

Although plaintiff PPA has received two letters from defendant Sica, as Executive Secretary of defendant Board of Pharmacy, these letters hardly provide the requsite threat of prosecution found in *Doe* v. *Bolton, supra.* The first letter, dated December 1, 1973 did not even mention prosecution, and although the second letter, dated February 23, 1973, did threaten possible legal action, plaintiff PPA was so little intimidated by the threat that it waited over a year before commencing this action on April 5, 1974. Moreover, although PPA alleged a visit to its premises on September 4, 1974, this visit was for informational gathering purposes only and plaintiff failed to pinpoint any case in which actual legal action was instituted under similar circumstances. The fact that the Board of Pharmacy has been aware of the activities of

plaintiff PPA since at least December 1, 1973 and yet has never caused the initiation of legal action, coupled with the fact that plaintiffs failed to allege any prosecutions under the current statute, indicates that plaintiff PPA's fear of prosecution is indeed "chimerical" and therefore plaintiff PPA's claim of standing to attack § 6811 is deficient under the *Poe* rule. *A fortiori* plaintiff Hagen's claim of standing must also fail.

B. New York, like many other States, has reasonably determined that only licensed pharmacists may sell nonprescription contraceptives.

The District Court, relying principally on *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), held that access to contraceptive products is an aspect of the right of privacy, i.e., a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment, without reaching the issue whether such right of access is a fundamental right which would require a "compelling state interest" to justify its abridgement.

The District Court concluded, citing the opinion of the United States Court of Appeals for the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), *reversed on other grounds,* 416 U.S. 1 (1974), that it must *carefully scrutinize* the provisions of Section 6811(8) to determine whether such provisions are, *in fact,* sufficiently related to a legitimate state interest to justify their infringement on the constitutional right, carved out by the District Court, of access to contraceptive products.

In so doing, the District Court applied an improper standard to the provision of Section 6811(8) which provides that only licensed pharmacists may sell nonprescription contraceptive products, effectively treating a right of access to contraceptive products as a fundamental right notwithstanding that the District Court did not, and indeed could not, find such right to be fundamental.

New York in providing that only licensed pharmacists may sell contraceptive products has merely regulated the sources from which individuals sixteen years and older may obtain contraceptive products. It cannot really be disputed that such products are readily available to these individuals in New York State and appellees have not seriously disputed such fact. Accordingly, the licensed pharmacy aspect of Section 6811(8) hardly reaches the level of "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child", *Eisenstadt* v. *Baird, supra,* 453, the issue before this Court in *Griswold* and later in *Roe* v. *Wade,* 410 U.S. 113 (1973). (*Compare, Eisenstadt* v. *Baird, supra,* 453, right of access to contraceptives by unmarried individuals decided on traditional equal protection grounds—"whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons . . ." ". . . whatever the rights of the individual to access to contraceptives may be, the rights must be the same for unmarried and the married alike".)

By applying the standard enunciated by the Second Circuit in *Belle Terre,* the District Court applied a stricter constitutional standard than warranted to state legislation which establishes a classification. Such standard has never been adopted by this Court and indeed was specifically rejected by this Court on appeal in *Boraas* and in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). It is for the legislature, not the courts, to balance the advantages and disadvantages of the regulation. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Beauharnis* v. *Illinois,* 343 U.S. 250 (1952). Where a classification is involved, it is only necessary that it be reasonable, and "that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District* v. *Rodriguez, supra,* 40.

The New York Legislature has expressed a proper concern that young people not sell contraceptives and thus

have provided that only licensed pharmacists may sell contraceptive products. This assures that only persons of mature years will be involved in the sale of such products.

Moreover, by only permitting licensed pharmacists to sell contraceptive products, the State Board of Pharmacy, which employs investigators to assure implementation of the Pharmacy Law (Education Law § 6804), is able to police so much of Section 6811(8) which forbids display of contraceptive products in licensed pharmacies, and sales to minors under the age of sixteen. If the sale of contraceptive devices were permitted in other establishments as well, the burden of policing these provisions would be prohibitive.

By declaring this provision of § 6811(8) unconstitutional, the District Court has jeopardized the validity of the legislation of many other States (See footnote, *supra*, p. 4), warranting plenary review by this Court.

C. New York has reasonably determined that children fifteen years and younger may only obtain contraceptive products from licensed physicians.

Contraceptive products and devices are only available to minors fifteen years and younger in New York State if dispensed directly by a physician, New York Education Law § 6807(1)(b). New York has determined that the authorization for such distribution should come directly from a doctor. New York, consistent with its policy against advertisement and display does not want contraceptive products being sold over the counter to very young people. Such a policy would, it is believed, sanction sexual activity on the part of these young people, contrary to the public policy of this State.

Placing a physician between the child and the contraceptive product or device heightens the importance society attaches to a decision to partake in sexual activity at such a young age while on the other hand, accommodating the needs of those sexually active children who disregard the

socially prescribed standards. Such a statutory scheme does not violate a minor's constitutional rights.*

Although recognizing that issues relating to sexual intercourse by minors below a certain age are matters with which a State may be legitimately concerned, the District Court concluded that Section 6811(8) was not, *in fact*, substantially related to achieving its asserted purposes. Again, however, the District Court erroneously applied an, *in fact*, substantial relationship test instead of the proper equal protection analysis of whether a classification bears some rational relationship to legitimate state purposes.

Minority as a special classification has always had judicial sanction. *George* v. *United States*, 196 F. 2d 445 (9th Cir. 1952), cert. den. 344 U.S. 843 (1952). Because of its strong and abiding interest in youth, the state may regulate minors' access to material which a state clearly could not regulate as to adults. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 690 (1968). Even where there is an invasion of protected freedoms, the power of the State to control the conduct of children reaches beyond the scope of its authority over adults. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Mass*, 321 U.S. 158 (1944).

Although the age of maturity differs with different children, the legislature may make classifications as to age which will not be interfered with by the courts unless they are clearly unreasonable and arbitrary. *In re Morrissey*, 137 U.S. 157 (1890); *Jacobson* v. *Lenhart*, 30 Ill. 2d 255, 195 N.E. 2d 638 (1964); *Ex Parte Weber*, 149 Cal. 392, 86 P. 809 (1906). If different levels of maturity

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* New York accords special status to minors in other areas as well, e.g. New York Domestic Relations Law § 15(2); New York Penal Law §§ 30.00; 130.30, 130.35, 130.40, 130.45, 131.50. Moreover, States other than New York, appear to have similar provisions with regard to contraceptive products. California Welf. and Inst'ns Code § 10053.2 (1971). Nebraska Rev. Stat. § 71-1112; *Utah, Jane Doe* v. *Planned Parenthood Assoc. of Utah* (Memorandum Decision No. 204803, District Court, Salt Lake City, May 15, 1972).

were to preclude age classification, all children would be allowed to vote and have access to alcoholic beverages and obscene material.

New York has determined that exposure of minors to contraceptives, as set out in the statute, would encourage promiscuity. Consistent with that policy, while recognizing that in certain circumstances contraceptives must be supplied, New York has reasonably limited their distribution to minors under the age of sixteen by licensed physicians.*

D. The District Court improperly concluded that Section 6811(8) bars public interest information regarding non-prescription contraceptives.

In addition to providing that only licensed pharmacists may sell contraceptive products, Section 6811(8) prohibits the display or advertisement of contraceptive products. This provision is similar, if not virtually identical to, the provisions of various other States (see footnote, *supra*, p. 4). Section 6811(8) reflects a concern by the New York Legislature that individuals not be exposed to displays and advertisements of contraceptive products which may be offensive and embarrassing to many. It additionally indicates a concern that display and advertisements of contraceptive products will lead to legitimization of sexual activity on the part of young citizens of this State and increased promiscuity. *Cf. Planned Parenthood Committee* v. *Maricopa County*, 92 Arizona 231, 375 P. 2d 719 (Sup. Ct. 1962).

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* The District Court erroneously states that New York Social Services Law Section 350(1)(e) and § 365-a(3)(c) are exceptions to Education Law § 6811(8). Insofar as the Social Services Law provides for distribution of contraceptives to eligible persons of child-bearing age who are sexually active, if such person is less than sixteen years of age, such products must be made available through a physician.

Appellants argued, and the District Court agreed, that advertisements and displays which are purely commercial may validly be regulated by the State. However, the District Court went on to invalidate the advertisement and display provisions of § 6811(8) on the grounds that the statute bars "public interest" and mixed as well as purely commercial advertising and display. Although the District Court observed that the PPA advertisements in the record before it represented purely commercial speech, the Court held that in the First Amendment area even litigants whose speech could properly be regulated by a narrowly drafted statute may challenge an overbroad statute on its face.

Noting that the New York Education Law § 6802(19) defines "advertisements" as "all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of drugs, devices, or cosmetics", the District Court went on to find the advertisement and display provisions of Section 6811(8) overbroad. The District Court did not detail the exact aspects of § 6802(19) which it regarded as overbroad and appellants submit that § 6802(19) only limits commercial advertisement of contraceptive products and is not constitutionally overbroad.

Section 6802(19) speaks of representations of a particular drug, device, or cosmetic that will lead directly or indirectly to the purchase of the article. This is a definition of a normal commercial advertisement and, indeed, so far as this record indicates, Section 6811(8) has never been applied to any material that was not of a purely commercial nature.

The applicable test is whether the statute conveys "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947). Even in

criminal cases, where the overbreadth standard is the most stringent the statute must only demonstrate an "ascertainable standard of guilt." *Winters* v. *People of State of New York*, 333 U.S. 507 (1948).

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . The Constitution does not require impossible standards." 332 U.S. at 7.

The word "advertisement" has a clearly commercial connotation, and it strains credulity to accept any argument that the use of such word in § 6811(8) suffers from overbreadth. Unlike the statute involved in *Bigelow* v. *Commonwealth of Virginia*, 43 U.S.L.W. 4734 (June 16, 1975), Section 6811(8) speaks only in terms of advertisements, does not refer to publications or lectures, and is more limited in its scope than Va. Code § 18.1-63 under attack in *Bigelow*. Insofar as an individual chooses to join both public and commercial advertisements in one release, it seems clear that with regard to that part of the release which is commercial, prosecution would be possible. *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942).

Although this Court has permitted individuals to challenge a state statute on the grounds that it is facially overbroad even though the individual's own conduct could be regulated by a more narrowly drawn statute, such attacks should only be permitted where there is a serious dispute as to the statute's meaning and not where the statute is susceptible of a constitutional construction and indeed, has always been applied consistent with such constitutional construction. *Broderick* v. *Oklahoma*, 413 U.S. 601 (1973).

CONCLUSION

This Court should note probable jurisdiction and summarily reverse the decision below or, in the alternative, should grant plenary consideration to the instant appeal.

Dated: New York, New York, September 19, 1975.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE, and POPULATION PLANNING ASSOCIATES, INC.,

Plaintiffs,

v.

MALCOLM WILSON, individually and as Governor of the State of New York; LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York; ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

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Appendix A.

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LAWRENCE W. PIERCE, D.J.

Opinion.

Plaintiffs have brought this action seeking declaratory and injunctive relief against enforcement of Section 6811(8) of the New York State Education Law insofar as that section applies to non-prescription contraceptives.[1] Plaintiffs claim that as applied to the aforesaid items, the statute violates the First, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution. Specifically, the plaintiffs claim, *inter alia*, that the statute violates the constitutional right of privacy of New York State residents, which embraces a right to obtain non-prescription contraceptives, and that it restricts the First Amendment right of New York State residents to receive information concerning such products, as well as the plaintiffs' own right to dispense such information.[2] The action is brought under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343(3).

Appendix A.

Following oral argument before the Court, plaintiffs moved for summary judgment, pursuant to Rule 56 Fed.R.Civ.P., claiming that there is no genuine issue of material fact to be tried and that they are entitled to judgment as a matter of law. Defendants oppose the motion for summary judgment and have moved to dismiss the complaint.

The challenged statute reads as follows:

"It shall be a class A misdemeanor for:

• • •

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited;" N.Y. Educ. Law § 6811(8) (McKinney 1972).

Plaintiffs seek relief against each of the three provisions of the statute.

I

Plaintiffs in this action are:

1. *Population Planning Associates, Inc.* [*PPA*]. PPA is alleged to be a North Carolina corporation which maintains an office in the County, City, and State of New York. The supplemental complaint alleges that PPA is primarily engaged in the retail sale of non-medical contraceptive devices through the United States mails; that it publishes advertisements containing order forms for its products in national periodicals entering New York State and occasionally places such advertisements in periodicals published

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and circulated in New York State; that it approves and fills orders for its products, including orders from New York State residents, at its North Carolina office; and that PPA also mails contraceptive devices to New York State residents from that office.

2. *Population Services International* [*PSI*]. Plaintiff PSI is alleged to be a North Carolina non-profit corporation with an office in the County, City, and State of New York. Its primary objectives are alleged to be discovering and implementing new methods of conveying birth control information and services to persons who do not now receive them, with the ultimate goal of reducing fertility, unwanted pregnancy, and population growth. Its activities, some of which are said to be performed within the State of New York, include development, test marketing, advertising and display of contraceptive products.

3. *The Reverend James B. Hagen* [*Hagen*]. Plaintiff Hagen is alleged to be an ordained minister of the Protestant Episcopal Church and Rector of a church in Brooklyn, New York. The supplemental complaint alleges that he is also coordinator of the Sunset Action Group Against V.D., which sponsors a program in which male contraceptive devices are sold and distributed to persons who are both over and under the age of sixteen, both at the church in Brooklyn, New York, and at a local retail outlet which is not a licensed pharmacy.

4. *Dr. Anna T. Rand, Dr. Edward Elkin, and Dr. Charles Arnold.* Doctors Rand, Elkin, and Arnold are alleged to be physicians active in family planning, pediatrics, and obstetrics-gynecology. It is alleged that they treat sexually active adolescents both over and under the age of sixteen and that they advocate the distribution of non-medical contraceptives through non-pharmacy outlets.

Appendix A.

5. *John Doe.* John Doe is alleged to be an adult male resident of New York whose access to contraceptive products and information about them and whose freedom to distribute the same to his minor children under the age of sixteen are allegedly inhibited by the operation of the New York State statute.

In connection with its above-described activities, plaintiff PPA has received three communications from the defendant Board of Pharmacy of the State of New York [Board] and defendant Albert J. Sica [Sica], the Board's Executive Director. The first, a letter dated December 1, 1971, informed PPA that its advertisement in a New York State college newspaper, which was alleged to have "solicited the sale of condoms to students", was in violation of the statute challenged here. The letter advised PPA of the three provisions of § 6811(8) and sought "future compliance with [the] law." The second, a letter dated February 23, 1973, asserted that PPA's offer to sell contraceptives for men through magazine ads was in violation of the subject law. After urging compliance with the law, the letter stated: "In the event you fail to comply, the matter will be referred to our Attorney General for legal action." The third, dated September 4, 1974, was a copy of a report made to the Board by its inspectors following a visit to PPA's New York office.[3] The report noted, *inter alia*, that PPA advertises male contraceptives. It indicated further that Philip D. Harvey, President of PPA, had been advised to stop selling contraceptives as it is a violation of the New York State Education Law for PPA to do so. Defendants deny that the inspectors directly threatened prosecution. But, it is undisputed that the inspectors said they would report the facts concerning PPA's alleged violation of the law to the Board of Pharmacy.

The defendants in this action are the Governor and Attorney General of the State of New York, the Executive

Secretary of the Board of Pharmacy of the State of New York, and the Board of Pharmacy itself.[4] These defendants challenge the right of any of the plaintiffs to bring the instant suit. Defendants claim that none of the plaintiffs has standing to challenge the statute at issue and that no case or controversy is presented to the Court for resolution. These claims will be considered in the first instance insofar as they relate to plaintiffs, PPA and Hagen.

The initial question to be decided is whether plaintiffs PPA and Hagen have such a "personal stake in the outcome of the controversy" that there exists the "concrete adverseness" which courts require in considering issues presented for decision. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

There can be no question that the statute at issue interferes with New York State residents' access to non-prescription contraceptives and that it prohibits certain dissemination of information about them. There is equally no question that whatever constitutional privacy right there may be to have access to such contraceptives, it is not a right that these two plaintiffs are asserting on their own behalf. Under certain circumstances, however, it is well established that plaintiffs may represent the constitutional rights of persons not before the court. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958); *Barrows* v. *Jackson*, 346 U.S. 249 (1953). The Supreme Court has found this doctrine applicable in several cases involving the right of privacy. See *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The *Eisenstadt* decision is particularly instructive with respect to the present action.

In *Eisenstadt*, the plaintiff Baird, an advocate of the use of contraceptives who had been convicted for illegally distributing a non-prescription contraceptive product,

sought to challenge his conviction on the ground that the State statute under which he was convicted violated the right of single persons to obtain contraceptives. The defendants in that case challenged his standing because he was not a single person unable to obtain contraceptives. See *Eisenstadt* v. *Baird, supra*, at 443. The Court found the case an appropriate one for relaxing the usual rule against third-party standing. It allowed Baird to represent the rights of unmarried persons denied access to contraceptives, even though he was not such a person himself and had no professional relationship with such persons.

In upholding Baird's standing, the Court stated that:

> "[T]he relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between *an advocate of the rights of persons to obtain contraceptives* and those desirous of doing so." Id. at 445 (emphasis added).

The Court went on:

> "[M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on third-party interests. • • • Enforcement of the [challenged] statute will materially impair the ability of single persons to obtain contraceptives." *Id.* at 445-46.

Like Baird, plaintiffs PPA and Hagen are advocates of the privacy rights of those they seek to represent. They advocate the increased availability of non-prescription contraceptives to those whose ability to obtain them is impaired by § 6811(8). While such an advocacy role, standing alone, might not confer on these plaintiffs the right

to represent the interests of third-parties, see *Tileston* v. *Ullman,* 381 U.S. 44 (1943), this role, combined with other factors which were also present in *Eisenstadt,* leads this Court to conclude that third-party representation is appropriate in this case. As was true in *Eisenstadt,* the statute challenged here prohibits not use, but distribution of contraceptive products. If distributors such as PPA and Hagen are barred from asserting the privacy rights of persons whose access to these products is impaired, this statute might well be immune from attack. Individual users would present no controversy since they cannot be prosecuted under the statute. Sellers and distributors would have no standing because they have no privacy rights. The Court is loath to permit such a result.

Of perhaps even greater importance is the fact that, as the following analysis will show, the Court is satisfied that these plaintiffs have an adequate incentive to assert vigorously the rights of those they seek to represent. Defendants argue that because there have been no prosecutions under § 6811(8) these plaintiffs present no case or controversy, as required by Article III of the Constitution, and this case should be controlled by *Poe* v. *Ullman,* 367 U.S. 497 (1961). There the Supreme Court dismissed appeals challenging certain Connecticut statutes which prohibited the use of contraceptive devices and the giving of medical advice relative to their use. The Court found that where the State had virtually never enforced the statute,[5] the plaintiffs' purported fear of prosecution was "chimerical" and no case or controversy was presented. See *Id.* at 508.

The statute at issue here can hardly be characterized as moribund, however, While the parties have cited no prosecutions under § 6811(8) itself, there were several prosecutions under its predecessor statute, § 1142 of the Penal Law, the latest occurring in 1965.[6] Various bills seeking to amend or repeal the section have been debated and defeated, leaving no doubt that the Legislature has not

lost interest in its provisions.[7] And the notices to PPA evidence the continuing concern of the State Board of Pharmacy in achieving compliance with the law. This case is therefore much closer to *Doe* v. *Bolton, supra,* where the Court found the requisite controversy present with respect to the plaintiff doctors, despite the fact that the record contained no showing that any one of them had been prosecuted or even threatened with prosecution under the abortion statute at issue there. See *Id.* at 188. See also *Epperson* v. *Arkansas,* 393 U.S. 97 (1968). Further, the Supreme Court has recently noted that,

> "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the [federal] plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel* v. *Thompson,* 415 U.S. 452, 462 (1974).

This observation is no less compelling when applied to a plaintiff properly asserting third-party interests.

In sum, because of the combination of factors present in this case—(1) the fact that only sellers and distributors, e.g., PPA and Hagen, are subject to the prohibitions of the challenged statute, (2) the fact that as those against whom this statute operates directly these plaintiffs present a genuine controversy, and (3) the role of these parties as advocates of the rights of others—this Court finds that plaintiffs PPA and Hagen have standing to assert the rights of those New York State residents whose access to non-prescription contraceptives is impaired by § 6811(8).

In addition to claiming that § 6811(8) infringes on the constitutional right of privacy, plaintiffs claim that the statute's total prohibition of any advertisement and display violates the First Amendment. The Court finds that

both PPA and Hagen also have standing to represent the First Amendment rights of New York State residents who are potential recipients of information these plaintiffs might seek to disseminate. See *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *New York Times Co.* v. *United States*, 403 U.S. 713, 749 (1970) (Burger, C.J., dissenting); cf. *Gajon Bar & Grill* v. *Kelly*, —— F.2d ——, No. 74-1791 (2d Cir. December 5, 1974). Further, Hagen, as an individual, clearly has standing to challenge this provision's effect on his own First Amendment rights. See *Eisenstadt* v. *Baird, supra*, at 457 (Douglas, J., concurring); *Griswold* v. *Connecticut, supra*, at 482.

Defendants challenge the standing of Doctors Rand, Elkin, and Charles on quite a different ground. They claim that New York State law exempts physicians from the prohibitions of § 6811(8) and that as a result, these plaintiffs present no controversy with respect to the statute and have no standing in this case. This interpretation of the State statutory scheme, supported by *amicus curiae* Planned Parenthood of New York City, Inc. and vigorously disputed by plaintiffs, rests on unsettled questions of New York State law.[8] In view of the Court's conclusion that PPA and Hagen have standing to challenge all provisions of the statute, these questions relating to the doctors' standing need not be decided. However, to the extent that the question bears on other aspects of this case, the Court will treat the issues as if it were established—as it is said to be by the Assistant Attorney General of the State of New York—that physicians may distribute non-prescription contraceptives to their patients, regardless of age. Therefore, all references in this opinion to the "pharmacists only" provision of the statute should be read as incorporating this assumption.

The conclusion that some plaintiffs have standing likewise makes it unnecessary to address the defendants' contention that before John Doe may be accorded standing he must be required to identify himself and demonstrate that he in fact suffers the deprivations claimed. Nor is it necessary to determine whether standing might be extended to PSI, whose present or contemplated involvement in the retail sale of non-prescription contraceptives is not apparent on the face of the record.

II

Having found that there are persons before the Court with standing to challenge the three provisions of § 6811(8), we turn to the merits of the action. The plaintiffs' central charge against § 6811(8) is that it infringes the right of New York State residents to have access to non-prescription contraceptive devices. Plaintiffs contend this right is embraced by the constitutional right of privacy as that right has been developed in a line of Supreme Court decisions spanning the last decade.

The constitutional right of privacy was first recognized in *Griswold* v. *Connecticut, supra*. Although the Court did not specify the precise source of this "right", indicating only that it emanated from the "penumbras" of specific guarantees of the Bill of Rights, *Id.* at 485, it there held that because of this right the State of Connecticut could not constitutionally bar married persons from using contraceptives. See *Id.* at 485. In *Eisenstadt* v. *Baird, supra*, the Court went further and stated that,

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child." *Id.* at 453.

Without deciding the "important question" of what, if any, constitutional protection was to be accorded the right

of access to contraceptives, the Court concluded that a State statute which distinguished between married and unmarried persons with respect to this right violated the Equal Protection Clause of the Fourteenth Amendment. See *Id.* at 454-55.

In *Roe* v. *Wade*, 410 U.S. 113 (1973), the Court recognized that the right of privacy encompassed a woman's decision whether or not to terminate her pregnancy. The Court held that while this right was not absolute, the right to make this decision was "fundamental" and could be infringed only in furtherance of a "compelling" State interest. See *id.* at 154-55, 162-63. Finally, in *Doe* v. *Bolton*, *supra*, while again noting that the "fundamental" right of a woman to terminate her pregnancy was not absolute, the Court invalidated as unconstitutional several restrictions on the exercise of that right. See *id.*, at 192-200.

The reach of the constitutional right of privacy has yet to be determined. However, as noted by the Court of Appeals for this Circuit, the Supreme Court's privacy decisions have made it clear that protection extends to "'the most intimate phases of personal life' having to do with sexual intercourse and its possible consequences." *Roe* v. *Ingraham*, 480 F.2d 102, 107 (2d Cir. 1973).

There has been some suggestion that the Supreme Court's references to *Eisenstadt* v. *Baird*, *supra*, in later cases, see, e.g., *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 65 (1973); *Roe* v. *Wade*, *supra*, at 152-53; *Id.* at 213 (Douglas, J., concurring), has been such as to indicate a view by the Court that that case recognized an implied extension of the right of privacy to cover access to contraceptives. See, Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670, 706 n. 221 (1973) [Note, *On Privacy*]. Whether the Court's opinion in *Eisenstadt* should now be read together with Griswold as having recognized such a right, or, as

we think, only as having forecast its recognition, see *Roe* v. *Ingraham*, *supra*, at 107, this Court has no doubt that access to contraceptives is an aspect of the right of privacy, that is, a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment. See *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 639-40 (1974); *Roe* v. *Wade*, *supra*, at 153; *Id.* at 169-70 (Stewart, J., concurring); *Griswold* v. *Connecticut*, *supra*, at 500 (Harlan, J., concurring); *Poe* v. *Ullman*, *supra*, at 542-45 (Harlan, J., dissenting from dismissal of appeal).

It is evident that each of the provisions of § 6811(8) burdens the exercise of the right this Court has found to be constitutionally protected. The Due Process Clause requires, therefore, that the Court carefully scrutinize each provision of the statute to determine whether, as drafted, it is in fact sufficiently related to a legitimate State interest to justify its infringement of the right at stake. Cf. *Boraas* v. *Village of Belle Terre*, 476 F.2d 806, 814-15 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974). It is only if the answer to this inquiry is in the affirmative that the Court need consider whether this particular aspect of the right of privacy is "fundamental", requiring a "compelling" state interest to justify its abridgment.

Prohibition of Sale or Distribution to Minors under Sixteen

The starting point in considering the statute's ban on sale or distribution of non-prescription contraceptives to minors under the age of sixteen years is the principle, recently reaffirmed by the Supreme Court, that persons are not excepted from the protections of the Constitution merely because they are minors. See *Wood* v. *Stickland*, 43 U.S.L.W. 4293 (U.S. February 25, 1975); *Goss* v. *Lopez*,

43 U.S.L.W. 418 (U.S. January 22, 1975); *Tinker* v. *Des Moines Community School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967). While no Supreme Court decision has explicitly held that the right of privacy extends to minor persons, a growing number of lower courts have done so. See, e.g., *Foe* v. *Vanderhoof*, —— F. Supp. ——, Civ. No. 74-F-418 (D.C. Colo. Feb. 5, 1975); *Coe* v. *Gerstein*, 376 F.Supp. 695 (S.D. Fla. 1973), *appeal dismissed*, ——U.S. ——, 94 S.Ct. 2246 (1974); *Merriken* v. *Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973); *In re P.J.*, 12 Crim. L. Rep. 2549 (D.C. Super. Ct. Feb. 6, 1973); *Washington* v. *Koome*, Civ. No. 42645 (Wash., Jan. 7, 1975). See also Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 Harv. L. Rev. 1001, 1011 n.7 (1975) [Note, *Parental Counsel*] and cases cited therein. This Court rejects at the outset any suggestion that the privacy right at issue here, i.e., access to non-prescription contraceptives, is necessarily inapplicable to minor persons under the age of sixteen.

In support of this provision of the statute, the defendants assert that the State has an interest in promoting the morality of its young people by seeking to discourage promiscuity and extramarital sexual intercourse by persons under the age of sixteen. Pursuit of this goal, they argue, is a legitimate exercise of the State's police power, aimed at protecting the health and welfare of its citizens. Were contraceptives made available to minors under the age of sixteen, the argument continues, the State would seem to be sanctioning sexual activity by its young persons and thereby encouraging promiscuity. Therefore, the defendants conclude, New York has reasonably attempted to further its policy goals by limiting the sale and distribution of non-prescription contraceptives to minors under the age of sixteen to licensed physicians.

The extent to which a State may legislate to regulate private morals and private sexual conduct is a difficult ques-

tion,[9] but one which need not be determined by this Court. For the purposes of this opinion, the Court assumes that issues relating to sexual intercourse by minors below a certain age are matters with which the State may legitimately be concerned. However, as the following analysis will show, this Court is unable to conclude that the legislation at issue here is substantially related to achieving the State's asserted purposes.

We note first that the defendants themselves have stated that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives. . . ."[10] The State contends, however, relying by way of analogy on decisions dealing with regulation of obscenity, that unless such a result is explicitly disproved it is not irrational or impermissible for the Legislature to restrict minors' access to contraceptives in the hope of limiting their sexual activity. See, e.g., *Paris Adult Theatre I* v. *Slaton, supra*, at 60-61; *Ginsberg* v. *New York*, 390 U.S. 629, 642-43 (1968).

There are, however, important distinctions between the instant case and those cases dealing with obscenity regulation. First, obscenity does not enjoy constitutional protection. See *Roth* v. *United States*, 354 U.S. 476, 485 (1957). Thus, in conceding the State's power to regulate it on the basis of unproved or unprovable assumptions, the Supreme Court was not considering an exercise of State power which infringed constitutionally protected rights such as the right of privacy involved here.[11]

Second, in the obscenity area, there has been no serious argument that the opposite policy, i.e., promoting the availability of the regulated material, would serve a positive end for the potential recipients or for the State. However, just such an argument can be advanced persuasively in this case.

To begin with, it is not beyond the power of this Court to note that some young persons under the age of sixteen, including some in New York State do engage in sexual in-

tercourse[12] and that the consequence of such activity is often venereal disease, unwanted pregnancy, or both.[13] The State Legislature has acknowledged as much—at least by implication—by enacting statutes which do allow minors to obtain contraceptives under many circumstances[14] and permit them to consent to medical treatment relating to venereal disease or pregnancy without the consent of a parent, guardian, or any other person.[15] Nor is the Court precluded from noting the substantial documentation, cited to the Court by plaintiffs and *amicus curiae*, of the dangers of venereal disease and pregnancy for young persons and of the substantial burdens which unwanted pregnancy and childbirth may place on young parents, on their children and on society itself.[16]

The defendants have cited no authority to contest the existence or severity of these realities. Nor have they challenged the view that when sexual intercourse takes place, venereal disease and pregnancy are more likely to occur when contraceptives are not used. This Court concludes that where, as here, there is substantial evidence that harm may result from enforcement of particular legislation and that positive benefits may result from reversing that policy, and where the legislation in question burdens the exercise of a constitutionally protected right, it is not sufficient for the State to support its claim that the statute furthers some other legislative aim merely by asserting that the plaintiffs have not disproved that claim. See *Paris Adult Theatre I* v. *Slaton, supra,* at 60. Cf. *Eisenstadt* v. *Baird, supra,* at 463-64 (White, J., concurring).

A second factor which casts significant doubt on the relationship between § 6811(8) and the purported State interest of deterring sexual activity by minors under sixteen is the existence of substantial statutory exceptions to the provision prohibiting distribution of contraceptives to those persons. In fact, not only does New York State law allow

non-prescription contraceptives to be made available to some persons under the age of sixteen, under some circumstances the law mandates that this be done.

In this regard, the Court notes that in 1973 the New York State Legislature enacted into law Section 350(1)(e) of the New York Social Services Law. As amended in 1974, this section, which implements the federal program of aid to needy families with dependent children [AFDC],[17] provides that "family planning services and supplies *shall be offered and promptly furnished to eligible persons of childbearing age, including children who can be considered sexually active,* who desire such services and supplies . . ." (emphasis added). This State statute has no age requirement. The only factors required to trigger the State's affirmative obligation to provide family planning services and supplies are that the child be sexually active, desire the services and supplies, and be eligible for the program. In addition, the New York State program for Medical Assistance for Needy Persons, again by way of implementing a federal program,[18] requires that family planning services and supplies be furnished to children who can be considered sexually active, regardless of age, if these children desire the services and supplies and are eligible for the program.[19] And, assuming that any physician presently may distribute non-prescription contraceptives to patients under the age of sixteen, this is yet a third major exception to the purported statutory ban.[20]

Thus, it appears that under present New York State law, the ban on sale or distribution of non-prescription contraceptives is directed only at those persons under the age of sixteen who are not eligible for AFDC or Medicaid services or who do not seek access to a physician. Putting aside whatever Equal Protection claims might arise from such a statutory scheme, cf. *Eisenstadt* v. *Baird, supra,* the existence of such major exceptions to the ban

under review here casts serious doubt on whether it can be viewed as substantially related to New York's purported goal of deterring sexual conduct by minors under the age of sixteen years.[22]

In sum, careful scrutiny of the subject statutory provision reveals that: (1) the State has cited no evidence whatever to the Court that sexual activity among young persons under the age of sixteen decreases as the availability of contraceptives is restricted; and (2) the New York State Legislature already has created substantial exceptions to the prohibition on distribution of non-prescription contraceptives to those under sixteen. Given these factors, the Court must conclude that, even assuming that the State has a legitimate interest in seeking to deter sexual intercourse by minors under the age of sixteen, there is no substantial relationship between § 6811(8) and this purported interest. Under these circumstances, the provision of § 6811(8) prohibiting the sale or distribution of contraceptives to persons under the age of sixteen years is found to be in violation of the Fourteenth Amendment and must be ruled unconstitutional.

PROHIBITION OF SALE OR DISTRIBUTION BY ANYONE OTHER THAN A LICENSED PHARMACIST

There is no doubt that by limiting the sale or distribution of non-prescription contraceptives to licensed pharmacists § 6811(8) restricts access to these products. To justify this restriction the defendants suggest two State interests.

The defendants argue first that the provision of the statute allowing only pharmacists to sell or distribute contraceptives is necessary to enable the State to police the statute's prohibitions of advertising and display and of sales to persons under sixteen conveniently and effectively.

In other words, it is said to be imposed as a means of implementing these other two provisions of the statute.

In considering this contention, we assume that the State may have legitimate interests in imposing some regulations on advertising and display of non-prescription contraceptives and in limiting, to some extent, the persons to whom such products may be sold. However, having made this assumption, the question remains whether facilitating administrative enforcement of these regulations is itself a State interest of sufficient magnitude to justify the limitation which it places on the right of access to non-prescription contraceptives, i.e., by making them available only from a licensed pharmacist or a physician. In other words, the question is whether the increased administrative burden of enforcement which defendants contend would result if these products were sold and distributed through other types of outlets is such that it justifies the present limitation on access.

Under a variety of other circumstances, courts have extended constitutional rights, where they were found to apply, despite the clear prospect of increased administrative inconvenience and burden. See, e.g., *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Id.* at 41-44 (Burger, C.J., concurring); *Goldberg* v. *Kelly*, 397 U.S 254 (1970); *Almenares* v. *Wyman*, 334 F.Supp. 512 (S.D.N.Y.), *aff'd as modified*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). The Court concludes that in this instance, administrative convenience in enforcing other regulations, assumed to be valid, does not serve as a sufficient basis for the significant restriction this provision imposes on the right of access to non-prescription contraceptive products.

The defendants' second argument for the "pharmacists only" limitation is that it permits purchasers to inquire as to the qualities of various non-prescription contraceptive

products and to receive impartial, professional advice as to their use and relative worth. The State has offered no evidence whatever to suggest what unique training or qualifications licensed pharmacists may possess which would specially qualify them to give professional advice with respect to these products. But, we are willing to assume that the training received by licensed pharmacists in areas such as chemistry, physiology, and pharmacology may well make them better qualified than other retailers to render advice concerning the efficacy, proper use, and possible hazards of the various non-prescription contraceptives available.

Precisely the same view might be asserted, however, with regard to a variety of non-prescription products and patent medicines sold widely and regularly in New York State by pharmacists and non-pharmacists alike. Analgesics, antacids, decongestants, cough remedies, vitamin supplements and laxatives are but a few examples of the many drug items which are widely available not only in pharmacies but in other types of retail outlets such as supermarkets, although some customers might wish to receive professional advice about them before selecting a particular product. Where such advice is desired, it might well be sought from a licensed pharmacist. It does not necessarily follow that all customers would require such advice, or that those who do should be able to purchase the products only from the same or another licensed pharmacist, once the advice has been received. The defendants have suggested no reason, and the Court can perceive none, why the non-prescription contraceptive products under consideration here should be sold to all persons and at all times *only* by persons with the background and training of a licensed pharmacist.

Deference to the State's judgment in this area might be indicated, even without evidentiary support, were there no

constitutional right involved. But a restriction which burdens a constitutional right must receive greater scrutiny. See *Eistenstadt* v. *Baird, supra,* at 463-65 (White, J., concurring). The Court concludes that this provision of the statute is not sufficiently related to a legitimate State interest, cf. *Boraas* v. *Village of Bell Terre, supra,* at 814-15, to justify its infringement of the privacy right—access to non-prescription contraceptives—which is present in this case. The provision, as drafted, is overly restrictive and unconstitutional.

The Court's conclusion, that the State interests advanced in support of the "pharmacists only" provision of § 6811 (8) are insufficient to justify its limitation on the right of access, does not mean that the State may not constitutionally place any limits at all on the sources through which non-prescription contraceptives may be distributed. The State may well have legitimate interests, not asserted in this action, e.g., promoting quality control and sanitary delivery of these products,[22] or protecting the health and safety of those citizens who use them, which would be substantially furthered by other limitations on distribution. If, for example, it were shown that certain non-prescription contraceptives would undergo physical or chemical changes, rendering them ineffective or harmful, as a result of certain temperature or humidity conditions, a prohibition of methods of distribution which would subject the products to such conditions might well be warranted. This might include a ban on sale through vending machines in open areas, subways, or other locations. A showing that vandalism which could result in contamination of the products was likely might warrant an even wider ban on vending machine distribution. Similarly, were a showing to be made that a particular product might pose a health hazard to users, the State would have a substantial interest in limiting the sale of such a product. However, for the

purposes of deciding the questions presented in this case, it is enough that the Court conclude, as it has, that the interests actually asserted here by the defendants are not sufficient to support the limitation contained in this provision of the subject statute.

PROHIBITION OF ADVERTISEMENT AND DISPLAY

The final provision of § 6811(8) to be considered, insofar as it applies to non-prescription contraceptives, is the statute's absolute ban on any advertisement or display of such products. Plaintiffs attack this prohibition as an unconstitutional limitation on speech protected by the First Amendment.[23] Defendants contend that the speech at issue is commercial and unprotected by the First Amendment. They argue further that citizens should not be exposed to displays and advertisements of contraceptive products which many might find embarrassing and offensive, and that advertising and display of such products will lead to increased promiscuity on the part of the young citizens of the State.

It cannot be gainsaid that the complete ban on advertisement and display limits the ability of New York State residents to receive information, see *Pell* v. *Procunier*, 417 U.S. 817, 832 (1974); *Kleindeinst* v. *Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), and the right of individuals to dispense information. See *Eisenstadt* v. *Baird, supra*, at 457 (Douglas, J., concurring); *Griswold* v. *Connecticut, supra*, at 482. The fact that the information affected by the ban may be available from some alternative source, as defendants contend, cannot of itself defeat plaintiffs' First amendment claims. See *Kleindeinst* v. *Mandel, supra*, at 765. The question becomes, therefore, whether the statute's ban is permissible merely because the speech involved is in the form of an advertisement.

For the purpose of analysis, the advertisements and displays to which this portion of the subject statute might apply can be divided into three categories. The first category, which can be characterized as purely commercial, would include, for example, advertisements and displays of the products of one or more particular manufacturers, intended solely for the purose of selling these products. The second category, which can be characterized as pure "public interest" material, would include, for example, informational literature and advertisements, unrelated to the products of any particular manufacturer, and displays of non-prescription contraceptives appearing in the context of lectures, family planning clinics, and events of a similar nature. The third category would include those mixed advertisements and displays which contain elements of each of the other two types.

As to advertisements and displays which are purely commercial, it has long been held that commercial speech or advertising is not afforded the same degree of First Amendment protection as other forms of speech. See, e.g., *Breard* v. *Alexandria*, 341 U.S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942); *Banzhaf* v. *F.C.C.*, 405 F.2d 1083, 1101-3 (D.C. Cir. 1968), *cert. denied, sub nom. Tobacco Institute, Inc.* v. *F.C.C.*, 396 U.S. 842 (1968). The Supreme Court has just recently declined to define the exact extent to which the First Amendment applies to commercial advertising. See *Bigelow* v. *Virginia*, 43 U.S.L.W. 4743, 4739 (U.S. June 16, 1975). But, as this Court reads *Bigelow* and the prior decisions discussed therein, it is still the law that purely commercial speech—whatever may be the scope of that term—does not enjoy constitutional protection. Therefore, as to advertisement and displays which are purely commercial, this Court concludes that these may validly be regulated by the State. We do not accept the position, urged by plaintiffs at oral argument, that *any*

advertisement of contraceptive products is so linked to the exercise of a protected privacy right that it is protected by the Constitution.[24]

Were this portion of § 6811(8) limited in its effect to a ban on purely commercial activity, the Court might well sustain its constitutionality. It is apparent, however, that the subject statute operates to ban *any* advertisement and display of non-prescription contraceptives, regardless of its educational value, its relation to the public interest, or its connection to the exercise of personal rights of privacy.[25] In other words, the statute bans "public interest" and mixed, as well as purely commercial, advertising and display. It is in these respects that the statute runs afoul of the Constitution.

The Supreme Court has made it clear beyond doubt that the fact that speech appears in the form of a paid commercial advertisement does not, of itself, deprive it of the protections of the First Amendment. See *Bigelow* v. *Virginia, supra; Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 384 (1973); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). "[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966).

In *Valentine* v. *Chrestensen, supra,* the Court was faced with the question of the validity of a statute prohibiting distribution in the streets of printed handbills containing commercial advertising matter, as applied to an individual who was distributing a double-faced bill. On one side was a commercial advertisement and on the other was a protest statement concerning a matter of public interest. See *id.* at 53. The Court ruled that on the stipulated facts, the conclusion was justified that the "public interest" material had been affixed to the advertising circular only for the

purpose of evading an ordinance which lawfully regulated commercial speech.[26] The Court, therefore, upheld the conviction of the petitioner, without attempting to appraise the mixed contents of the communication to determine what was of "public interest" and what was for commercial profit. See *id.* at 55. Clearly implicit in the Chrestensen decision, however, was the conclusion that under appropriate circumstances, a mixed "public interest"—commercial advertisement would be protected by the First Amendment.

This implicit conclusion was made explicit in *Bigelow* v. *Virginia, supra.* There, the Court was faced with the application, to an advertisement containing both commercial and "public interest" elements, of a statute making it a misdemeanor to encourage or prompt the procuring of an abortion or miscarriage through an advertisement or by any other means. Viewing the advertisement, which pertained to the availability of legal abortions in the State of New York, in its entirety, the Court concluded that while the advertisement undeniably proposed a commercial transaction, it also "conveyed information of potential interest and value to a diverse audience. . . ." *Id.* at 4738. After balancing the interests at stake, the Court concluded that the Virginia statute could not constitutionally be applied to the advertisement at issue. *Id.* at 4739-40. If mixed "public interest"-commercial speech may fall within the ambit of the First Amendment, *a fortiori,* purely "public interest" advertisements and displays would also merit constitutional protection."

The disposition of this case does not require us to attempt what the *Bigelow* Court declined to do, i.e., to set an abstract standard by which to determine when a particular communication which contains commercial advertising also contains sufficient material which is of public interest, or is sufficiently related to activities protected by

the right of privacy, to warrant First Amendment protection for the communication as a whole. It is sufficient for these purposes to reject the suggestion that "public interest" or "public interest"-commercial advertising can never obtain constitutional protection. Regulations affecting protected freedoms must be narrowly drawn. See *Erznoznik* v. *City of Jacksonville,* 43 U.S.L.W. 4809, 4813 (U.S. June 23, 1975); *N.A.A.C.P.* v *Alabama,* 377 U.S. 288, 307 (1964). The New York statute operates to prohibit dissemination of informational material relating to the intimate phases of sexual life protected by the right of privacy and to such matter of public interest and importance as birth control, contraception, and population growth. Clearly, the statute is overbroad. Hence, it must be declared unconstitutional.[28]

In reaching this conclusion, the Court does not conclude that the State has no legitimate interest in protecting the sensibilities of its citizens, regardless of age, from offensive and objectionable advertisements or displays. Of course, offensiveness is not the measure of free speech. See *Cohen* v. *California,* 403 U.S. 15 (1971). But certainly, at a minimum, such advertisements can be regulated in accordance with the standards constitutionally permitting regulation of display of obscene material. See, e.g., *Miller* v. *California,* 413 U.S. 15 (1973); *Ginsberg* v. *New York, supra; Ginzburg* v. *United States, supra.* But see, Note, *On Privacy, supra,* at 708. This Court's holding is limited to the conclusion that the State may not, consistent with the mandate of the First Amendment, ban all, advertising and displays relating to non-prescription contraceptive products.

III

Having determined that the three provisions of § 6811(8) of the New York State Education Law cannot withstand the scrutiny required by the First Amendment and the Fourteen Amendment's Due Process Clause, we must consider the appropriate relief to be granted. Plaintiffs have requested both declaratory and injunctive relief. These requests will be considered separately. See *Steffel* v. *Thompson, supra,* at 468-69; *Zwickler* v. *Koota,* 389 U.S. 241, 254 (1967).

Declaratory relief against a State statute may certainly be granted under the circumstances of this case where prosecution has been threatened, but is not yet pending. See *Steffel* v. *Thompson, supra,* at 475. In part II of this opinion, the Court concluded that each of the three statutory provisions under attack was unconstitutional. Further, having examined the pleadings, briefs, and affidavits of the parties and having heard oral argument on the questions raised, the Court has concluded, that there is no genuine issue of material fact to be tried. Therefore, plaintiffs' motion for summary judgment is granted as to the request for declaratory relief. In granting this relief we find the provisions of § 6811(8) of the New York State Education law to be violative of the First and Fourtenth Amendments of the Constitution as set forth above.

As to injunctive relief, it is clear that the strick prohibitions of *Younger* v. *Harris,* 401 U.S. 37 (1971) do not apply where, as here, no state prosecution has been commenced either prior to the filing of the complaint or before the occurrence of "proceedings of substance" in the federal court. See *Hicks* v. *Miranda,* 43 U.S.L.W. 4857, 4862 (U.S. June 24, 1975); *Steffel* v. *Thompson, supra* at 461-62; *414 Theater Corp.* v. *Murphy,* 499 F.2d 1155, 1160-61 (2d Cir. 1974). While the Supreme Court as yet has

not ruled definitively on the question of whether an injunction may issue against a threatened state prosecution, see *Allee* v. *Medrano*, 416 U.S. 802 (1974), it is established that "[C]onsiderations of equity practice and comity . . . have little force in the absence of a pending state proceeding." *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498, 509 (1972). Therefore, the Court is not barred from issuing an injunction under the circumstances of this case.

In view of the nature of the rights at stake and the effect of the State statute, the Court concludes that injunctive relief is appropriate in this case. Since there are no genuine issues of material fact, the plaintiffs' motion for summary judgment is also granted with respect to the request for injunctive relief.

As to the provision prohibiting the sale or distribution of non-prescription contraceptives to persons under the age of sixteen, the Court has further concluded that injunctive relief should be effective upon entry of this Court's judgment. In addition to impeding the exercise of a constitutionally protected right, enforcement of this prohibition gives rise to the prospect that some of the persons whose rights are burdened may also suffer great and immediate harm resulting from unwanted pregnancy and from venereal disease. There can be no question but that such hardships weigh heavily upon those individuals who experience them. The attendant cost to the community and to society of such consequences, where they occur, is also not unnoticed by the Court. The defendants are therefore enjoined from enforcing the provisions of the statute which prohibits sale of contraceptive products to persons under the age of sixteen years of age, insofar as that section applies to non-prescription contraceptives. The effect of this ruling will be to bring the remaining segment of this population abreast of those persons under the age of sixteen to whom the New York State Legislature has already extended access to non-prescription contraceptives.[29]

As to the second and third provisions of the statute—those prohibiting sale or distribution by anyone other than a licensed pharmacist and prohibiting advertisement and display—the Court has also concluded that there are no genuine issues of material fact and that these provisions unconstitutionally restrict the exercise of protected rights. We have recognized further, however, that the State may well have legitimate interests sufficient to support provisions which would sweep less broadly through these areas. In recognition of those interests; in light of our view that the State is not to be prohibited entirely from legislating in the areas covered by these provisions; and in the "spirit" of *Younger* v. *Harris, supra,* we conclude that an injunction should issue against enforcement of these provisons, but that it should be stayed for a period of time. This stay will give the State Legislature the opportunity to enact narrower provisions, if it chooses to, which reflect appropriate constitutional concerns, without depriving the State of all legislation in this area in the interim while such measures are considered.[30]

The defendants are therefore enjoined from enforcing the provisions of § 6811(8) of the New York State Education Law which prohibit sales by any person other than a licensed pharmacist and prohibit advertising and display, insofar as these provisions apply to non-prescription contraceptives. The injunction against enforcement of these provisions is stayed for 120 days following entry of the Court's judgment.

In sum, as applied to non-prescription contraceptives, § 6811(8) of the New York State Education law, as presently drafted, is declared to be unconstitutional in its entirety. As so applied, its enforcement is enjoined. However, the injunction against enforcement of the provisions of the statute relating to distribution by persons other than a licensed pharmacist and relating to advertisement and

display is stayed for 120 days. The defendants' motion is denied.

Submit order on notice.

So ORDERED.

Dated: New York, New York, July 2, 1975.

HENRY J. FRIENDLY
FRIENDLY, H. J., Circuit Judge

L. W. PIERCE
PIERCE, L. W., District Judge

WILLIAM C. CONNER
CONNER, W. C., District Judge

FOOTNOTES

[1] Because plaintiffs seek to enjoin the enforcement of a State statute on the ground that it is unconstitutional, a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284 to hear the case. See *Population Services International, Inc., et al.* v. *Wilson, et al.*, 383 F.Supp. 543 (S.D.N.Y. 1974).

[2] Plaintiffs have advanced a number of other constitutional claims including the assertion that the subject statute violates their rights under the Due Process Clause to engage in their respective professions and businesses. Because this action is determined on other grounds, these arguments need not be addressed.

[3] The copy of this report annexed to the supplemental complaint is in some part unreadable. However, a readable copy appears annexed to plaintiffs' notice of motion for leave to serve the supplemental complaint.

[4] Among the affirmative defenses asserted by the defendants is the claim that the Board of Pharmacy is not a "person" who can be sued under the statutes under which plaintiffs have asserted jurisdiction. This defense raises difficult questions which the Court declines to address in view of the fact that their determination will make no practical difference in the effectiveness of the relief granted to plaintiffs.

Defendants' other affirmative defenses, to the extent that they are not discussed in this opinion, have been considered and found to be without merit.

[5] The statutes challenged in *Poe* v. *Ullman, supra,* had been enacted in 1879. They had been put in issue only once, in 1940, when a State appellate court had upheld their validity on appeal from a demurrer to an information. After that ruling the State had moved to dismiss the information. See *id. at* 501-02.

[6] See *People* v. *Baird*, 47 Misc. 2d 478, 262 N.Y.S. 2d 947 (Sup. Ct. Nas. Co. 1965); *People* v. *Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918), *appealed dismissed*, 251 U.S. 537 (1919); *People* v. *Byrne*, 99 Misc. 1, 163 N.Y.S. 682 (Sup. Ct. Kings Co. 1917).

[7] In 1972, a bill to amend § 6811(8), S2181B, reached the floor of the New York State Senate, was debated, and was defeated. In April 1973, a bill that would have permitted contraceptives to be displayed in pharmacies, A6843B, was also debated and defeated. A similar bill was again defeated in 1974.

Appendix A.

[8] The starting point for defendants' contention is § 6807(b) of the State Education Law which states in part:

"This article shall not be construed to affect or prevent:

• • •

(b) Any physician . . . who is not the owner of a pharmacy, or registered store, or who is not in the employ of such owner, from supplying his patients with such drugs as the physician . . . deems proper in connection with his practice. . . ." N.Y. Educ. Law § 6807(b) (McKinney 1972).

The defendants then argue that non-prescription contraceptives fall within the statutory definition of drugs. The definitional section of the Article provides in part:

" 'Drugs' means:

• • •

(b) Articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals.

(c) Articles (other than food) intended to affect the structure or any function of the body of man or animals." N.Y. Educ. Law § 6802(7)(b)-(c) (McKinney 1972).

The parties have cited no interpretations of these two statutory provisions relating to their applicability to non-prescription contraceptives and the Court has found none. However, the Court has little difficulty in concluding that non-prescription contraceptives fall within the definitions of the term "Drug" set forth in the statute.

[9] See Note, *On Privacy, supra,* at 719-38 and materials cited therein.

[10] See Defendants' Memorandum of Law (August 1, 1974) at 23. Others have reached the same conclusion on this subject. See, e.g., Note, *A Minor's Right to Contraceptives,* 7 U. Cal. Davis L. Rev. 270, 273 (1974), citing Pilpel & Wechsler, *Birth Control, Teenagers and the Law: A New Look 1971,* 3 Family Planning Perspectives 37 (1971).

[11] Unprovable but "rational" assumptions also "underlie much lawful state regulation of commercial and business affairs [citations omitted]." *Paris Adult Theatre I* v. *Slaton, supra,* at 61.

[12] See genarally Hoise and Goldsmith, *Planned Parenthood Services for the Young Teenager,* 4 Family Planning Perspectives 27 (1972); Kantner and Zelnik, *Contraception and Pregnancy: Experience of Young Unmarried Women in the United States,* 5 Family Planning Perspectives 21 (1973).

Appendix A.

[13] See Mencken, *The Health and Social Consequences of Teenage Childbearing,* 4 Family Planning Perspectives 45 (1972).

[14] See *infra* at 27-29.

[15] Any person including those under sixteen may be treated for venereal disease without the consent or knowledge of the person's parents or guardian. See N.Y. Pub. Health Law § 2305 (McKinney Supp. 1972). Any person under sixteen who is the parent of a child may consent to any medical services for himself or herself, including services related to subsequent pregnancy. See N.Y. Pub. Health Law § 2504 (McKinney Supp. 1972).

[16] See Memorandum of Law of American Civil Liberties Union, *amicus curiae,* at 23-25; Plaintiff's Reply Memorandum (September, 19, 1974) at 13-15.

[17] See 42 U.S.C. § 602(a)(15)(A); 45 CFR § 220.21, Family Planning Services.

[18] See 42 U.S.C. §§ 1396 et seq.; *Id.* at 1396d(a)(vii)(4)(c).

[19] See New York Social Services Law § 365-a(3)(c) (McKinney Supp. 1974).

[20] The statutory scheme creates other anomalous situations. A female under the age of sixteen years may marry if proper consent is obtained. See N.Y. Dom. Rel. Law § 15(2)-(3) (McKinney Supp. 1974). However, § 6811(8) of the State Education Law contains no exception which would allow such a person to obtain contraceptives, even with parental consent.

[21] It could be argued from the foregoing analysis that the aim of this statute is not to deter persons under sixteen from engaging in sexual intercourse, as the State's attorney contends, but rather to deter them from using contraceptives. There is little doubt that if the Court were to conclude that deterring the use of contraceptives was in fact the sole purpose of the subject legislation, the statute would be vulnerable to attack under the Equal Protection Clause of the Fourteenth Amendment. The Court can perceive no fair and substantial basis for distinguishing between persons over and under the age of sixteen years with respect to the use of contraceptives. See *Eisenstadt* v. *Baird, supra,* at 453-54; *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). Both are subject to at least the same risks of harm from venereal disease and unwanted pregnancies. We note that the State has not

Appendix A.

attempted to justify this provision as a health measure, perhaps in recognition of these realities.

[22] In their initial brief, submitted in opposition to plaintiffs' motion for the convening of a three-judge court, the defendants asserted that the present statute served to promote quality control. See Defendants' Memorandum (August 1, 1974) at 16. However, the argument was not pursued at oral argument on that motion or at any other time since.

[23] Plaintiffs also claim this provision places an impermissible burden on the privacy rights of New York State residents to use and obtain contraceptives. In view of our conclusion with respect to the First Amendment claim it is unnecessary to consider the privacy right.

[24] The Court is aware of the language in *Bigelow* v. *Virginia, supra*, noting that the activity with which the advertisement in that case was concerned—legal abortions—"pertained to constitutional interests." *Id* at 4738. However, this was one of many factors mentioned by the Court in reaching its conclusion that the advertisement in question was protected by the First Amendment. We do not read *Bigelow*, or any other decision of which we are aware, as standing for the absolute prohibition urged upon us by plaintiffs.

[25] The Education Law defines "advertisement" as "all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of drugs, devices or cosmetics." N.Y. Educ. Law § 6802(19) (McKinney 1972).

[26] Chrestensen had first attempted to distribute the bill in a form containing only the commercial advertising. He was advised by the Police Commissioner that this was against the law. See *id.* at 53.

[27] One conclusion to be drawn from the foregoing analysis is that it is the nature of the advertisement or display and not its source which, in this Court's view, determines whether or not First Amendment protections obtain.

[28] In reaching the conclusion that the present statute is unconstitutionally overbroad, it is not necessary for the Court to determine whether the advertisements actually placed by any of the plaintiffs constitute protected speech. In the First Amendment area even litigants whose speech could properly be regulated by a narrowly drafted statute may challenge an overbroad statute on

Appendix A.

its face. See, e.g., *Bigelow* v. *Virginia, supra* at 4736; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-12 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). However, were we to consider this question with respect to the PPA advertisements in the record before the Court, we would conclude that advertisements of this type do represent purely commercial speech which might well be regulable under an appropriate statute.

[29] See *supra* at 27-29.

[30] The fact that the injunction against these two provisions of the statute is stayed does not mean, of course, that the Court contemplates their being enforced during the interim so as to proscribe constitutionally protected activity. Should the necessity arise, it is well within the power of the State courts, which have been called "the primary guarantors of constitutional rights," see Hart and Wechsler, *The Federal Courts and the Federal System* (2d Ed. 1973) at 359, to determine the Constitutional protection applicable in a particular instance.

Appendix B.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572
LWP

POPULATION SERVICES INTERNATIONAL; DR. ANNA T. RAND; DR. EDWARD ELKIN; DR. CHARLES ARNOLD; THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Plaintiffs,

against

MALCOLM WILSON, individually and as Governor of the State of New York; LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York; ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York, and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

SIRS:

PLEASE TAKE NOTICE that the defendants hereby appeal to the U.S. Supreme Court from the judgment of this Court, entered July 18, 1975, in its entirety which declared Section 6811(8) of the New York State Education Law

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unconstitutional and enjoined its enforcement and from each and every part of such judgment.

Dated: New York, New York, July 24, 1975.

Yours, etc.,

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State of New York
Attorney for Defendants
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To: KARPATKIN, POLLET & LEMOULT, Esqs.
1345 Avenue of the Americas
New York, New York 10019

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appeal Docketed September 20, 1975

Probable Jurisdiction Noted
June 7, 1976

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* The opinion of the District Court is reproduced in the appendix to the Jurisdictional Statement at 1a-35a.

Docket Entries—District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE, and POPULATION PLANNING ASSOCIATES, INC.,

Plaintiffs,

v.

MALCOLM WILSON, individually and as Governor of the State of New York; LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York; ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

DATE	PROCEEDINGS
April 18–74	Filed complaint & issued summons.
May 29–74	Filed ANSWER.
June 25–74	Filed Pltffs. Notice of Motion & Supporting affidavit. Re: 3 Judge Court. ret. 7/8/74.
June 25–74	Filed Pltffs. Memorandum of law.
Aug. 2–74	Filed Defts. Notice of Motion for Judgment. Ret. Sine Die.
Aug. 2–74	Filed Defts. Memorandum of Law.
Sept. 20–74	Filed pltffs' reply memorandum to defts' memorandum opposing motion seeking an order to convene a Three Judge Court.

Docket Entries—District Court.

DATE	PROCEEDINGS
Oct. 11–74	Filed stip & order—complaint is hereby supplemented. A Supplemental complaint be filed with this Court—Pierce, J.
Oct. 10–74	Filed Supplemental Complaint.
Oct. 23–74	Filed OPINION #41,354—defts' motion for judgment on the pleadings Rule 12(c) is denied. The pltffs' motion requesting the convening of a 3 Judge court is hereby granted. The request will be forwarded to the Chief Judge of this circuit upon filing of this opinion and order. So Ordered—Pierce, J. Mailed notices.
Jan. 20–75	Filed SUPPLEMENTAL ANSWER of defts. to supplemental complaint.
Jan. 20–75	Filed defts' memorandum of law in opposition to motion for a preliminary injunction.
Feb. 20–75	Filed pltffs' statement under Rule 9(g) & notice of motion for summary judgment. Ret. 1-23-75.
Feb. 28–75	Filed defts' statement under Rule 9(g) in opposition to pltffs. 9(g) statement.
March 6–75	Filed pltff's affdvt to confirm & offer into evidence, the allegations set forth in paragraph 14(a) of the supplemental complaint.
March 11–75	Filed Affidavit by Victor J. D'Amico, Pharmacy Inspector with NY State Board of Pharmacy.
July 2–75	Filed memorandum Opinion # 42718: In sum as applied to non-prescription contraceptives, of the New York State Education law 6811 (8) as presently drafted is declared to be unconstitutional in its entirety. As so applied, its enforcement is enjoined, etc., as indicated. The defts motion is denied. Submit Order on Notice. Friendly, J. Pierce, J. Conner, J. M/N

DATE	PROCEEDINGS
July 16–75	Filed Order that the Judment and order of this court dated 7-16-75, be and hereby is stayed for fourteen days after the entry thereof and if within that period, defts should apply to the Supreme Court of the United States a stay pending appeal, until the disposition of such application, Friendly, J. Pierce, J. Conner, J. M/N
July 16–75	Filed Judgment and Order: The pltffs motion for summary judgment is granted and the defts motion to dismiss the complaint is denied, Friendly, J. Pierce, J. Conner, J.
July 24–75	Filed Notice that defts appeal to the U.S. Supreme Court from the judgment of this Court dated 7-18-75.
Oct. 22–75	Filed Pltffs reply memorandum.

Supplemental Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

1. This is a civil action seeking injunctive and declaratory relief. Plaintiffs seek a declaration that § 6811(8) of the New York State Education Law is unconstitutional insofar as it is applicable to nonprescription contraceptives, and an injunction against its enforcement to that extent. The challenged statute (1) prohibits the sale or distribution of contraceptive instruments, articles, recipes, drugs and medicines, including nonmedical or non-prescription contraceptives, to minors under the age of sixteen; (2) prohibits the sale or distribution of all contraceptives by any persons other than licensed pharmacists; and (3) totally prohibits and bans the advertisement or display of contraceptives. Failure to comply with the statute subjects the violator to conviction of a Class A misdemeanor and imprisonment up to one year. The statute is challenged on the grounds that it is in conflict with provisions of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is conferred on this Court by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, by 28 U.S.C. § 1331, 1343(3) and (4), 2201, 2202, 2281 and 2284, and by 42 U.S.C. § 1983.

3. Plaintiff Population Services International (hereinafter referred to as "PSI") is a North Carolina non-profit corporation wholly devoted to scientific and educational goals and is exempt from federal income taxation under the

Supplemental Complaint.

Internal Revenue Code of the United States. Its principal office is located in Chapel Hill, North Carolina, and an office is maintained in New York County in the City and State of New York. Pursuant to its charter, PSI's primary objectives are to discover and implement new methods of conveying birth control information and services to persons not now receiving them, with the ultimate goals of reducing unwanted pregnancy and reducing fertility and population growth. Toward this aim, PSI includes among its activities test marketing of contraceptive products, contraceptive product development, direct mail patient recruitment, the use of commercially proven techniques for informing and motivating persons about family planning, and the advertisement and display of contraceptive products. PSI performs its educational, scientific and research activities in the United States, including the State of New York, and abroad, and receives its funds in part from federal grants and contracts.

4. Plaintiff, Dr. Anna T. Rand, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in New York State. She received her Bachelor's Degree from New York University in 1933 and her medical degree from Boston University Medical School in 1937. Plaintiff Dr. Rand is an obstetrician-gynecologist and serves as an assistant professor in said specialized field of medicine at the Albert Einstein College of Medicine in New York City. Additionally, plaintiff Dr. Rand is the Director of Family Planning for the Department of Obstetrics and Gynecology of the Albert Einstein College of Medicine and is the Director of Family planning at the Bronx Municipal Hospital. As Director of Family Planning at Albert Einstein College of Medicine and the Bronx Municipal Hospital, plaintiff Dr. Rand establishes, organizes and directs family planning programs

which include among their activities, the distribution of contraceptives. Among those treated by plaintiff Dr. Rand and by said family planning programs are patients who are sexually active, including patients under the age of sixteen.

5. Plaintiff, Dr. Edward Elkin, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in the State of New York. He received his Bachelor's Degree from Harvard College in 1960 and his medical degree from New York University School of Medicine in 1964. Plaintiff Dr. Elkin is a pediatrician, having served his residency in pediatrics at Babies Hospital at the Columbia Presbyterian Medical Center. Plaintiff Dr. Elkin is an Associate in Pediatrics at the Mount Sinai School of Medicine and practices medicine as a pediatrician and physician for adolescents at the Adolescent Clinic at the Mount Sinai Hospital in New York City. In such practice plaintiff Dr. Elkin regularly sees and treats as patients sexually active adolescents both under the age of sixteen and over the age of sixteen.

6. Plaintiff, Dr. Charles Arnold, a resident of the County of New York, City and State of New York, is a physician licensed to practice medicine in the State of New York. He received his Bachelor's Degree from University of Puget Sound in 1956 and his medical degree from McGill University in 1960. Plaintiff Dr. Arnold additionally received a Master's Degree in Public Health Studies from the University of North Carolina in 1964. Plaintiff Dr. Arnold is a Clinical Associate Professor of Preventive Medicine at New York University Medical School and is also a Professor at New York University Graduate School of Public Administration. Plaintiff Dr. Arnold's primary professional and academic interests include the study and practice of family planning and the

establishment of programs for the distribution of contraceptive devices to sexually active adolescents, over and under the age of sixteen, located in urban areas, including New York City.

7. Plaintiff, The Reverend James B. Hagen, is an ordained minister of the Protestant Episcopal Church, and a resident of Kings County, in the City and State of New York. Plaintiff Reverend Hagen received his Bachelor's Degree from Mount Union College in Alliance, Ohio, and his theological training at the Episcopal Theological School in Cambridge, Massachusetts. He was ordained as a priest and minister of his church in 1966. Plaintiff Reverend Hagen is currently the Rector of St. Andrew's Episcopal Church located at 4917 Fourth Avenue, Brooklyn, New York. Plaintiff Reverend Hagen, under the sponsorship of his church, is the Coordinator of the Sunset Action Group Against V.D. Pursuant to a grant and program funded in part by the Office of Economic Opportunity, the Sunet Action Group Against V.D. sponsors a program in which male contraceptive devices are sold and distributed to local residents both over and under the age of sixteen, at the church and at a local retail outlet which is not a licensed pharmacy.

8. Plaintiff, John Doe (John Doe not being his real name because of fear of embarrassment if his real name were revealed), is a resident of the Town of Orangetown, Rockland County, in the State of New York. Plaintiff John Doe is forty-three years of age, is married, has four children, and engages actively in sexual conduct.

9. Plaintiff, Population Planning Associates, Inc. (hereinafter referred to as "PPA"), is a North Carolina corporation whose principal place of business is located at Chapel Hill, North Carolina. PPA also maintains an

office in the County of New York, in the City and State of New York. PPA is primarily engaged in the retail sale of nonmedical contraceptive devices through the United States mails. PPA advertises its products in national periodicals entering New York State and from time to time places advertisements for its products in local periodicals in New York State. PPA fulfills orders which it receives from residents of New York State and mails contraceptive devices to New York residents from its office in North Carolina.

10. Defendant, Malcolm Wilson, is the Governor of the State of New York. He is charged under the Constitution of the State of New York (Article 4, § 3) to take care that the laws of the State of New York are faithfully executed, including § 6811(8) of the Education Law which is herein challenged as being in conflict with the Constitution of the United States. Defendant Wilson is being sued in his official capacity. On information and belief, defendant Wilson resides and conducts his official business from the Executive Mansion in Albany, New York, and also maintains an office for the conduct of his official business in the County of New York.

11. Defendant, Louis J. Lefkowitz, is the Attorney General of the State of New York. He is the head of the Department of Law of the State of New York (Executive Law § 60), and is charged with prosecuting and defending all actions and proceedings in which the state is interested (Executive Law § 63). Defendant Lefkowitz is being sued in his official capacity. On information and belief, defendant Lefkowitz resides and conducts his official business from the Capitol, in Albany, New York, and also maintains an office for the conduct of his official business in the County of New York.

12. Defendant, Board of Pharmacy of the State of New York (hereinafter referred to as "Board"), is charged under the statutes and the law of the State of New York (Education Law, § 6804) with the enforcement, operation and execution of § 6811 (8) of the Education Law which is herein challenged as being in conflict with the Constitution of the United States, and defendant, Albert J. Sica, is its Executive Secretary. The defendants Board and Sica are being sued in their official capacities. On information and belief, defendant Sica resides in Albany, New York, and defendants Board and Sica conduct their official business from the Office of the State Board of Pharmacy in Albany, New York.

13. In December of 1971, plaintiff PPA received a letter from defendant Sica, as Executive Secretary of defendant Board, dated December 1, 1971, advising plaintiff PPA that its advertisement soliciting the sale of condoms in any issue of the Utica College Tangerine, the student newspaper at such college, was in violation of § 6811(8) of the New York State Education Law. A copy of such letter is annexed hereto as Exhibit A.

14. Some time in February of 1973, plaintiff PPA received a letter from the Assistant to defendant Sica, writing on behalf of defendant Sica, dated February 23, 1973. This letter informed plaintiff PPA that the solicitation of sales for contraceptive devices by PPA via magazine advertisements was in violation of the New York law which prohibited the sale of contraceptives to minors under the age of sixteen and limited sale only by licensed pharmacists. This letter warned plaintiff PPA that if it failed to comply with the statute, the matter would be referred by defendant Board to defendant Lefkowitz, Attorney General of the State of New York, for legal action. A copy of said letter is annexed hereto as Exhibit B.

14(a). On September 4, 1974, two inspectors engaged and employed by the defendants Board and Sica, its Executive Secretary, visited the New York office of the plaintiff PPA, for the purpose of threatening, and did then and there threaten, legal action against plaintiff PPA, if its advertisement appearing in the September 1974 issue of Playgirl Magazine, which, *inter alia,* advertised and solicited sales of nonprescription male contraceptives, or other similar advertising, were continued. A copy of the advertisement complained of is annexed hereto as Exhibit C. A copy of a Report completed by said defendants' inspectors, a copy of which was formally served on plaintiff PPA, is annexed hereto as Exhibit D. On information and belief, said visit and threat resulted from a complaint by a pharmaceutical manufacturer and distributor.

15. This case raises many questions under the Constitution and Laws of the United States, and the amount in controversy, with respect to each plaintiff, exceeds $10,000.00, exclusive of interest and costs.

16. Section 6811(8) of the Education Law of the State of New York provides as follows:

"Sec. 6811. Misdemeanors

It shall be a class A misdemeanor for:

. . .

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited;".

17. The provisions of New York State Education Law, § 6811(8), abridge, violate and conflict with the plaintiffs' rights under the First, Fifth Ninth and Fourteenth Amendments to the United States Constitution in at least the following respects:

(a) Plaintiff PSI is chilled, deterred and prohibited from performing its lawful functions under its charter in New York State. The purposes for which plaintiff PSI was formed and the activities which it undertakes include the encouragement and advancement of family planning and birth control through the distribution of nonprescription contraceptive devices, and the dissemination of information concerning contraceptives and advertisements for contraceptive products. PSI desires to implement its express and lawful aims by involving all species of retail distribution and sales outlets, in addition to licensed pharmacists, and also the various communications media, in the supply and advertisement of nonmedical contraceptive products. The challenged statute which prohibits PSI from carrying out its lawful and proper scientific and educational activities in New York is in violation of plaintiff PSI's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

(b) Plaintiff Dr. Rand, as a primary part of her medical and professional practice and in her capacity as Director of Family Planning at Albert Einstein College of Medicine and the Bronx Municipal Hospital, treats a patient population with substantial rates of unwanted pregnancies and venereal disease. Plaintiff Dr. Rand believes that it is medically imperative to be able to distribute contraceptives to the patients who come under her care, including sexually active adolescents under the age of sixteen, without the threat or fear of violating the law and possible criminal prosecution.

Plaintiff Dr. Elkin, as a significant part of his medical practice, treats sexually active adolescents. Because females under the age of sixteen bear children with a higher incidence of prematurity and infant mortality, and because of the trauma of abortion to a teenage female, particularly girls under the age of sixteen, and the difficult educational, physical and social problems faced by adolescents under the age of sixteen who bear children, plaintiff Dr. Elkin regards it as medically imperative to be able to sell or distribute contraceptives to such sexually active adolescents without the fear or threat of criminal prosecution. Additionally, plaintiff Dr. Elkin treats sexually active patients, married and unmarried, over the age of sixteen, and for reasons of sound medical practice wishes to sell or distribute contraceptive products to such patients.

Plaintiff Dr. Arnold, as part of his medical practice and as part of his activities as a researcher and academician in the field of family planning and birth control, operates programs supported by the federal government and otherwise to distribute nonmedical contraceptive products to adolescents in ghetto areas in New York City.

This statute which prohibits plaintiffs Drs. Rand, Elkin and Arnold from providing contraceptives to their patients, including adolescents under the age of sixteen, without fear of criminal prosecution, chills and deters them from practicing their professions as physicians and educators in violation of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(c) Plaintiff Reverend Hagen is an Episcopal priest who is the Coordinator of a program sponsored by St. Andrew's Episcopal Church which distributes male contraceptive devices to local residents both over and under the age of sixteen, at St. Andrew's Episcopal Church and at a local retail store near the Church which is not a licensed

pharmacy, and which does not employ a licensed pharmacist. This statute which on its face prohibits the plaintiff Reverend Hagen from distributing contraceptive devices without fear of criminal prosecution chills and deters him from undertaking activities sponsored by his church and in part supported by the federal government, in violation of his rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Moreover, plaintiff Reverend Hagen is thereby chilled and deterred from the proper performance of his pastoral duties to congregants of his church and others, many of whom seek out his advice and assistance in connection with birth control and family planning problems.

(d) Plaintiff John Doe is a married resident of New York, is forty-three years old and is the father of four children, two of whom are under the age of sixteen. Plaintiff John Doe's residence is approximately two miles distant from the nearest licensed pharmacist. This statute which precludes plaintiff John Doe from purchasing contraceptives at retail outlets other than those operated by licensed pharmacists, which impedes plaintiff John Doe from learning and gaining information or knowledge concerning contraceptive products, and which prohibits him from distributing or displaying contraceptives to his children, violates and burdens his right of privacy and liberty in matters related to family, marriage and sex, and burdens unduly his and his wife's right to determine whether to bear children. The limitation of sale of contraceptives to retail outlets operated by licensed pharmacists increases the likelihood that plaintiff John Doe will be unable to obtain such products at the times when they are needed. Accordingly, said statute violates plaintiff John Doe's rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(e) Plaintiff PPA has been threatened with criminal prosecution for advertising contraceptive products in New York State and for selling contraceptive products to residents in New York State through the United States mails. Plaintiff PPA would own and operate a retail outlet in New York State, not operated as a licensed pharmacy, for the sale and distribution of nonmedical contraceptives, but is prohibited from undertaking such business activity by § 6811(8) of the Education Law. The statute which directly operates to the detriment of plaintiff PPA's lawful business activities, is in violation of plaintiff PPA's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Further, said statute which allows licensed pharmacists to sell or distribute contraceptives while forbidding plaintiff PPA from selling or distributing contraceptive products either through the mails or through a nonlicensed retail outlet in New York State, is a violation of plaintiff PPA's rights to equal protection under the Fourteenth Amendment to the United States Constitution.

18. The provisions of § 6811(8) of the Education Law of the State of New York which impinge upon the fundamental rights of free speech, privacy and due process, do not promote any compelling State interest and are not rationally related to any propor or legitimate governmental concern. The statute, *inter alia*, invidiously discriminates between groups on the grounds of age and otherwise bestows special privileges upon one group (licensed pharmacists) without any rational basis and without any corresponding benefit to the public health and welfare.

19. The limitation of sales of nonprescription contraceptives to licensed pharmacists does not protect the health of New York citizens. The United States Food and Drug Administration, in accordance with Federal statutory pro-

visions, e.g., 21 U.S.C. § 353, determines which contraceptives require a prescription and may therefore be dispensed only by a licensed pharmacist. Invalidation of the challenged New York statute would allow nonprescription contraceptives to be sold elsewhere, as is the case with a multitude of other non-prescription products, and would have no effect on the continuation of limited availability only through licensed pharmacists of prescription-required products. The statute, by limiting the right to sell such products to licensed pharmacists only, does not control the quality of contraceptive products. The United States Food and Drug Administration has jurisdiction over nonprescription contraceptive products and through its powers of inspection and setting standards, assures quality control regardless of the location of the place of sale.

20. The validity of the statute is not supported by any purported State interest in regulating the morality of citicens and minors of New York State. No evidence exists which would demonstrate that said statute discourages sexual conduct or sexual promiscuity. The statute challenged herein results in large numbers of unwanted pregnancies to females under the age of sixteen, large numbers of unwanted child-births and large numbers of abortions to such groups, and prevents distribution of the means to prevent or minimize unwanted pregnancies, abortions and venereal disease.

21. The provisions of the challenged statute which limit the sale or distribution to licensed pharmacists increase the price of contraceptive products and deter the competition that would result in lower prices for the consumer and wider use of the products by those in need of them.

22. The utter irrationality of laws such as § 6811(8) of the New York State Education Law is demonstrated by the fact that many private and public groups, including the Commission on Population Growth and the American Future, chaired by John D. Rockefeller, 3rd, which was established by President Nixon and the United States Congress pursuant to Pub.L. No. 91-213 (March 16, 1970), have severely criticized such laws and demanded their repeal because of the impingement of individual liberty and the adverse serious social and health consequences caused by statutes such as the one challenged.

WHEREFORE, plaintiffs respectfully pray that this Court:

a) Assume jurisdiction of this cause and set this case down promptly for a hearing before a three-judge court pursuant to 28 U.S.C. § 2281 and 2284;

b) Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining the defendants, their successors in office, agents and employees, and all other persons in active concert, participation and communication with them, from continuing to administer and enforce the provisions of § 6811(8) of the Education Law of the State of New York insofar as they apply to nonprescription contraceptives;

c) Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that § 6811(8) of the Education Law of the State of New York is invalid as applied to nonprescription contraceptives on the grounds that it is violative of provisions contained in the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States;

d) Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein and also grant them such additional or alternative relief as may seem to this Court just, proper and equitable.

Dated: September 25, 1974.

Karpatkin, Ohrenstein & Pollet
1345 Avenue of the Americas
New York, New York 10019
Tel. (212) 765-2700
Attorneys for Plaintiffs

By Michael N. Pollet
Member of the Firm

Exhibit A.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
99 Washington Avenue
Albany, New York 12210

STATE BOARD OF PHARMACY
518: 474-3848

December 1, 1971

Population Planning Associates
105 North Columbia
Chapel Hill, North Carolina 27514

Gentlemen:

A recent issue of the Utica College Tangerie carried an ad on page 3 thereof in which your firm solicited the sale of condoms to students in this institution.

We are hereby advising you that you are in violation of Section 6811, Subdivision 8, of the New York State Education (Pharmacy) Law and request that you cease such activities in this state.

The law states that it is a misdemeanor for any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles within or without the premises of such a pharmacy is hereby prohibited.

We would appreciate word from your organization of future compliance with out law.

Very truly yours,

ALBERT J. SICA
Albert J. Sica
Executive Secretary

JAA:jmd

Exhibit B.

THE STATE EDUCATION DEPARTMENT
99 Washington Avenue
Albany, New York 12210

STATE BOARD OF PHARMACY
518: 474-3848

February 23, 1973

Population Planning Assoc.
105 N Columbia
Chapel Hill, North Carolina 27514

Gentlemen:

The New York State Education (Pharmacy) Law prohibits the sale at retail of all contraceptive preparations to a minor under the age of sixteen years. Contraceptives may only be sold at retail in registered pharmacies by licensed pharmacists.

We are certain the solicitation of sales of your contraceptives for men via magazine ads through the mails do not comply with our law. A copy of Section 6811 subdivision 8 is enclosed.

Your compliance with our state pharmacy law will be appreciated. In the event you fail to comply the matter will be referred to our Attorney General for legal action.

Very truly yours,

Albert J. Sica
Executive Secretary
JOHN A. ARMAO

By John A. Armao
Assistant to the Secretary

JAA:pac
Encs.

cc: Robert H. Bovier
H. C. McAllister

Exhibit C.

BIRTH CONTROL
PILLS

Now only YOU AND YOUR DOCTOR need to know. Our registered pharmacist will fill your birth control pill prescription the same day it is received. You save time and money with our convenient mail order service. Inclose prescription and payment for three-month supply.

☐ Demulen Triopak	($6.20)	☐ Ovral	($7.60)
☐ Enovid-E	($6.00)	☐ Ovulen Triopak	($6.20)
☐ Ortho Novum-21	($6.30)	☐ Norlestrin Img.	($7.30)

☐ Other Birth Control Pills (Send $6.50 toward a three-month supply. Our pharmacist can read your prescription. We will bill or refund you for any difference.)

☐ Deluxe Sampler of 22 men's contraceptives, $6

☐ Catalog alone (books, posters, clothes and more), 25¢

Mail today: Population Planning, Dept.
120 East 56th Street, Suite 1520
New York, New York 10022

Exhibit D.

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
BOARD OF PHARMACY

Name of owner—indiv., parnership or corp. (If reg., name as on cert.): Population Planning Associates.

No. and street: 170 E. 56th St., R-1520.

City or Village: New York. Include Zip Code: .....
County or Borough: Bx.

In re. assignment as: .....

Dated: / 196 . Initials ☐ KSG; ☐ JA; ☐ AGH;
.....

Date: 9-4-74. Time: 2 PM. No. of S. S. .....

No. of samples: ..... Cost: .....

Pharmacy: ..... Reg. No.: .....

Manufacturer or Wholesaler: .....
Reg. No.: .....

Storekeeper: ..... Reg. No.: .....

Other: .....

ACTION TAKEN: ☐ Inspection; ☐ Reinspection; ☐ Telephone Calls; ☐ Other: .....
☐ Auction of: .....

Name of Owner and Address

Pharmacists' names according to original license: .....
.....

Hours a week: ..... Date and number of license:
..... Does name on *current* reg. and lic. agree? .....
(Supervising Pharmacist)
.....

Exhibit D.

Does ownership continue as indicated above and on the registration certificate? ☐ Yes ☐ No. Hours open for business a week: .....

U. S. P. No.: ..... Edition: .....

N. F. No.: ..... Edition: .....

Handbook II: Yes ☐ No ☐.

Year: .....

Inspection Refused
Equipment
Label
Sanitation
Substitution

Proscribed drugs
Barbiturate irregularities
Outdated drugs not removed from stock
Refrigerable drugs not refrigerated
Prescription required for sale

Sale refused of prescription required items
Unlicensed person in charge
√ Solicits Rx
Delinquency in registration
√ Advertising for Contraceptives

Apprentice supervision
Insufficient No. of pharmacists
Pharmacist not registered
Pharmacist's license not displayed
Pharmacist's registration card not displayed

Comment or Recommendation: The above named advertised (attached is copy of advertisement) Birth control pills & male contraceptives—

Exhibit D.

The above named solicited prescriptions—which is illegal in NYS. The above sends the Rxs to Kansas, for filling—the prescriptions must be pre-paid.

It also advertises male contraceptives—the requests are sent to Chapel Hill, North Carolina—the home office of the above.

Interviewed Mr. Philip D. Harvey, Pres. of Populations Planning Associates—He was advised to stop advertising for Prescriptions, to stop selling contraceptives—It is a violation of NYS Education Law.

Attached is a catalogue—

Section 6804 of the Education Law provides, in part, that it is a misdemeanor for "Any person to intentionally prevent or knowingly refuse to permit any examiner or inspector to enter a pharmacy, drug store or any other establishment for the purpose of lawful inspection in accordance with the provisions of this article."

Received copy

PHILIP D. HARVEY
President
Title

(TO BE SIGNED BY PERSON IN CHARE AND KEPT ON FILE)

V. J. D'AMICO
Inspector

Continued on Back
Yes ☐ No ☐

Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, by their attorney Louis J. Lefkowitz, for their answer to the complaint herein respectfully allege:

1. Deny each and every allegation paragraphs 2, 15, 18, 19, 20, 21 and 22.

2. Deny knowledge or information sufficient to form a belief as to the truth or accuracy of each and every allegation of paragraphs 3, 4, 5, 6, 7, 8, and 9.

3. Deny each and every allegation of paragraph 10 except admit that Malcolm Wilson is the Governor of the State of New York, that plaintiffs have named him as a defendant in this action, that Governor Wilson resides and conducts his official business in Albany, New York and also maintains an office in New York City and refer to Article 4 § 3 of the Constitution of the State of New York for the contents thereof.

4. Deny each and every allegation of paragraph 11 except admit that Louis J. Lefkowitz is the Attorney General of the State of New York, that plaintiffs have named him as a defendant in this action, that he has an office in Albany, New York and the County of New York and refer the Court to New York Executive Law §§ 60 and 63 for the contents thereof.

5. Deny each and every allegation of paragraph 12 except admit that Albert Sica is the Executive Director of

Answer.

the Board and that the offices of the Board are in Albany, New York and refer this Court to New York Education Law §§ 6804 and 681(8) for the contents thereof.

6. Deny each and every allegation of paragraph 13 except admit that a letter (Exhibit 4 of the complaint) was sent to plaintiff, Population Planning Association (PPA), and refer to that letter for the contents thereof and deny knowledge or information as to what the PPA received.

7. Deny each and every allegation of paragraph 14 except admit that a letter (Exhibit 3 of the complaint) was sent to Population Planning Association, and refer to that letter for the contents thereof and deny knowledge or information as what the Population Planning Association received.

8. Deny each and every allegation of paragraph 17 except deny knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations therein as (1) to the purposes of Population Services International, (2) as to the practices of Dr. Rand, (3) as to what is the significant part of Dr. Elkin's practice, as to what he regards as medically imperative or as to his treatment of sexually active patients, married and unmarried, over the age of sixteen, (4) as to Dr. Arnold's medical practices, his activities as a researcher and academician or as to his operating any program supported by the federal government or otherwise for the purpose of distributing nonmedical contraceptive products, (5) as to Reverend Hagen activities as the Coordinator of a program allegedly sponsored by St. Andrew's Episcopal Church, (6) as to John Doe's status as a married resident of New York, forty-three years of age with four children, two under sixteen, and his place of residence or (7) as to what Population Planning Association would own or operate in New York State.

Answer.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

New York Education Law § 6811(8) is in all respects constitutional and plaintiffs have failed to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to allege a case or controversy and have no standing to sue.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Plaintiffs are immune from suit under the eleventh amendment.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Venue is improperly placed in the Southern District of New York.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE ON BEHALF OF DEFENDANT BOARD OF PHARMACY

Plaintiff Board of Pharmacy is not a person who may be sued under the statutes as set forth by plaintiffs in paragraph 2 of the complaint.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

Governor Malcolm Wilson is not directly responsible for enforcing § 6811(8) of the New York Education Law and is not a proper party hereto.

WHEREFORE, defendants request that the complaint herein be dismissed with costs.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

Supplemental Answer.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, for their supplemental answer to the supplemental complaint herein, respectfully allege:

1. Repeat each and every allegation and defense as previously set forth in the answer to the complaint herein.

2. Deny each and every allegation of paragraph "14(a)" of the supplemental complaint except admit that two inspectors employed by the Board of Pharmacy did visit the offices of plaintiff Population Planning Associates for the purpose of gathering information concerning an advertisement appearing in the September, 1974 issue of Playgirl Magazine.

WHEREFORE, it is respectfully requested that the complaint and supplemental complaint be dismissed with costs.

Dated: New York, New York
January 15, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

ARLENE R. SILVERMAN
ARLENE R. SILVERMAN
Assistant Attorney General

Notice of Motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE, that upon all of the pleadings and papers heretofore filed herein, the annexed affidavits of Diana Altman, duly sworn to the 29th day of May, 1974, of Philip D. Harvey, duly sworn to the 24th day of May, 1974, and Dr. Anna T. Rand, duly sworn to the 20th day of June, 1974, and upon the accompanying memorandum of law, the plaintiffs herein, pursuant to 28 U.S.C. §§ 2281 and 2284, will move this Court on July 8, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, N.Y., for an order requiring that this action and the plaintiffs' motion for a permanent injunction, restraining the enforcement, operation and execution of § 6811(8) of the New York Education Law, be heard before a three-judge district court.

Dated: New York, New York
June 21, 1974.

Yours, etc.

KARPATKIN, OHRENSTEIN & POLLET
Attorneys for Plantiffs

By MICHAEL N. POLLET
Member of the Firm

To: HON. LOUIS J. LEFKOWITZ
Attorney General of State of New York
Attorney for Defendants

Affidavit of Diana Altman.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NORTH CAROLINA
COUNTY OF ORANGE } ss.:

DIANA ALTMAN, being duly sworn, deposes and says:

1. I am the Secretary-Treasurer and Director for Programming of Population Services International (hereinafter "PSI"), a plaintiff in this lawsuit, which seeks a declaration of unconstitutionality and an injunction against the enforcement of § 6811(8) of the New York State Education Law with respect to its applicability to nonprescription contraceptives. PSI's principal place of business is located at 105 North Columbia Street, Chapel Hill, North Carolina. PSI also maintains an office at 120 East 56th Street, New York, New York. I reside at 53 Davie Circle in Chapel Hill, North Carolina. This affidavit is submitted in support of the plaintiff's motion for an order convening a three-judge court.

2. I received a baccalaureate degree from Florida State University in 1956, majoring in anthropology. In 1970 I was awarded a Master of Science in Public Health degree from the University of North Carolina, specializing in the fields of population and family planning administration.

3. I became associated with PSI in September of 1970, serving as the Director of Special Projects. I assumed my present office in 1973.

4. PSI was formed in January of 1970 as a non-profit corporation pursuant to the North Carolina Non-Profit

Corporation Act. PSI was granted exemption from federal income taxation in March of 1971, pursuant to 26 U.S.C. § 501(c)(3), as a non-profit corporation organized and operated exclusively for scientific and educational purposes. PSI's primary objective is to find new ways of bringing birth control information and services to people not now receiving them, with the ultimate goal of reducing unwanted pregnancy and of slowing population growth. The organization is particularly concerned with resolving the serious and increasing problem of unwanted pregnancies and venereal disease among the teenage population of the United States. PSI's activities are based upon the conviction that it is necessary to supplement the medically oriented traditional means of delivering family planning services in order to have any major impact upon the population crisis and the problems of unwanted pregnancies, abortions and venereal disease. Toward this end, PSI has initiated a series of programs serving to demonstrate the efficacy of harnessing commercial methods and resources in the population battle.

5. In 1972 and 1973, PSI received a grant totalling $90,000 from the Office of Economic Opportunity of the United States Government for work in the United States in developing a pilot project wherein teenage males in inner-city and rural areas were supplied by direct mail with information on reproduction, venereal diseases, contraception, and promotion of the male responsibility for contraception.

6. Additionally, PSI has received a total of approximately $500,000 in United States Government contracts from the Agency for International Development (AID), for work carried out in Kenya and the Philippines since January 1972. The projects in these countries are aimed at showing that direct mail, advertising and widespread retail outlets for the sale and distribution of contraceptives can

be an effective means for promoting family planning. PSI directs a similar project, funded by the International Planned Parenthood Federation, in Sri Lanka. PSI has also received grants for its work in the United States and abroad from The Population Council, the University of North Carolina, and various private foundations.

7. It is PSI's firm conviction that it is only through the mass marketing of nonprescription contraceptives such as the condom that problems of family planning and venereal disease can be effectively attacked. PSI desires to implement these programs by making nonprescription contraceptives available to all those who are sexually active through distribution and sale in all forms of retail outlets, and to educate the public through advertisements.

8. The New York State statute [Education Law, § 6811(8)] which limits the sale or distribution of nonprescription contraceptives to licensed pharmacists, which prohibits advertising or display of nonprescription contraceptives, and which forbids the sale of such products to minors under the age of sixteen, prevents PSI from carrying out its proper and lawful activities in New York State. Accordingly, it is causing PSI and the public which it wishes to serve in New York, irreparable harm and incalculable damage.

9. PSI has been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in the light of recent decisions by the Supreme Court, and that in order to enjoin the enforcement of a state statute for repugnance to the United States Constitution it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an order convening a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284.

(Sworn to by Diana Altman, May 29, 1974)

Affidavit of Philip D. Harvey.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

PHILIP D. HARVEY, being duly sworn, deposes and says:

1. I am the President of Population Planning Associates, Inc. (hereinafter "PPA"), a plaintiff in this lawsuit. This affidavit is submitted in support of the plaintiffs' motion pursuant to 28 U.S.C. §§ 2281 and 2284, for an order convening a three-judge court.

2. I am a graduate of Harvard College, having received a Bachelor of Arts degree from that institution in 1961. After two years of service in the United States Army, I was employed by CARE from 1964 through 1969 and served as a Deputy Country Director for CARE in India, where my primary responsibilities included administration, child nutrition, agriculture, and the development of pilot programs for family planning. In 1969 I received a Ford Foundation Mid-Career Fellowship and I commenced studies at the University of North Carolina, from which I received a Master of Science in Public Health degree in 1970. My academic specialization was in the fields of family planning and birth control promotion. I have written extensively in this field and have annexed as Exhibit A to this affidavit a bibliography listing various published works.

Affidavit of Philip D. Harvey.

3. PPA was formed in March of 1971 as a North Carolina corporation. Its principal place of business is located in Chapel Hill, North Carolina, and an office is maintained in New York, New York. I have been the President and chief executive officer of PPA since its inception.

4. PPA's primary business activity is the retail mail order sale of nonprescription contraceptives for males (condoms). PPA publishes advertisements containing order forms for its products in periodicals throughout the United States including periodicals published and circulated in New York State. Examples of several of PPA's current advertisements are annexed to this affidavit as Exhibit B. Additionally, PPA publishes such advertisements in periodicals of national circulation whose readers include citizens of New York. PPA approves and fulfills orders for the products it sells from its North Carolina office.

5. As a result of the above mentioned marketing activities, PPA has on two occasions been threatened by the defendant, Albert J. Sica, Executive Secretary of the defendant Board of Pharmacy of the State of New York, and informed that its solicitation of sales of condoms via magazine advertisements is in violation of the provisions of § 6811(8) of the Education Law. In a letter dated December 1, 1971 (annexed to the complaint as Exhibit A), the defendant Sica formally advised PPA that it was in violation of § 6811(8) and requested that PPA cease its activities in New York. On February 23, 1973, the defendant Sica wrote (see Exhibit B annexed to the complaint) that PPA's failure to comply with § 6811(8) would result in the referral of the matter to the defendant, Louis J. Lefkowitz, Attorney General of the State of New York, for legal action.

Affidavit of Philip D. Harvey.

6. The provisions of § 6811(8) of the Education Law which make PPA's lawful, proper and constitutionally protected activities a crime, and the threats of the defendant Sica to prosecute PPA, have caused and are continuing to cause irreparable harm and damage to PPA. PPA has been chilled and deterred from fully carrying out all of its proper business activities in New York. On information and belief, many periodicals have refused to accept PPA's advertisements because of fear that they would be violating § 6811(8) and would be prosecuted thereunder. Further, PPA wishes to expand its activities in New York to include the ownership of a retail store which is not a pharmacy, to sell and distribute nonprescription contraceptives. From 1971 through 1973 PPA owned and operated such a facility in Chapel Hill, North Carolina. The New York law which makes it a crime to sell or distribute nonprescription contraceptives outside of a pharmacy is unlawfully constricting PPA's business activities.

7. PPA has been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in the light of recent decisions by the Supreme Court, and that in order to enjoin the enforcement of a state statute for repugnance to the United States Constitution it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an order convening a three-judge court.

(Sworn to by Philip D. Harvey, May 24, 1974)

EXHIBIT A

BIBLIOGRAPHY

Philip D. Harvey

FAMILY PLANNING AND POPULATION

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"Improving Sales and Acceptance of Contraceptives," in *Fertility Control Methods—Strategies for Introduction*, Gordon W. Duncan et al, eds., Academic Press, New York, 1973.

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Exhibit A.

the International Experience, Michael McMillan, ed., East-West Communication Institute, Honolulu, May, 1973.

"Marketing Contraceptives by Mail," (with J.U. Farley), *Journal of Advertising Research*, Volume 12, No. 5, October, 1972.

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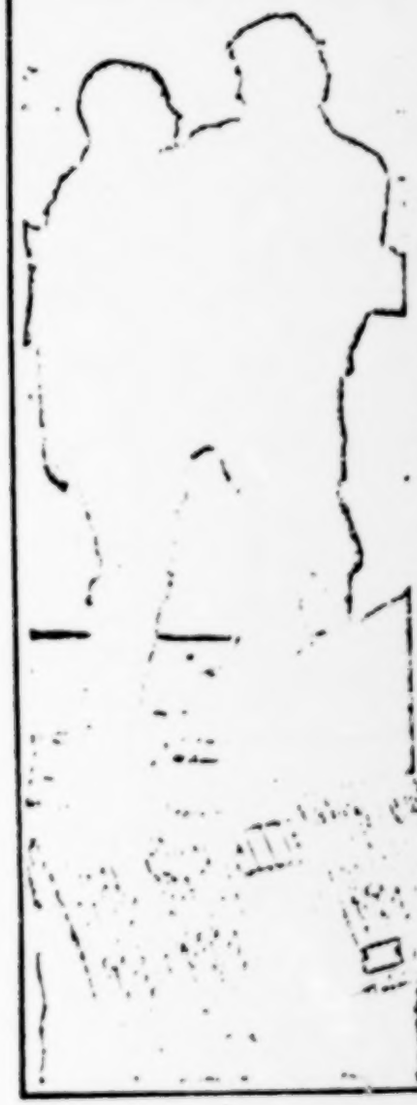
INTERNATIONAL DEVELOPMENT

"Development Potential in Famine Relief—the Bihar Model," *International Development Review*, Volume II, No. 4, December, 1969.

Exhibit B, Samples of Current Ads.



At last... condoms for men who hate condom

For years condoms have been a necessary evil—esse but not very nice to use. So we at Adam & Eve sorted all the little things that make condoms less than plea and we developed new Jade.

ONE: Most condoms are too thick for real pleasure. Ja so sheer you can hardly feel it. Yet because it is ma the very finest latex under strict government stand Jade is as reliable as any condom you can buy.

TWO: Cheap lubricants have an unpleasant medicinal s Jade is specially lubricated with AE66 silicone "love which is odorless and won't evaporate. This makes easier to put on and gives much greater sensitivity.

THREE: Ordinary condoms come in a cold clinical Jade comes in a tastefully-designed soft wallet. It's se not clinical.

FOUR: Jade sheaths are pale green, which apart from the color of masculine energy, makes them readily vis So you don't have to worry if they're on properly.

FIVE: Jade even eliminates the awkward problem of to do after. Each sheath comes with its own self-seal pi envelope for neat, esthetic disposal.

So if you hate to use condoms, mail the coupon and the pleasure of letting Jade, the very un-ordinary co ceptive, change your mind. It will be sent with our illust catalogue in a plain package. Satisfaction guaranteed or money back.

New JADE contraceptiv

Adam & Eve, Dept. 000
105 N. Columbia, Chapel Hill, N.C. 27514

Please send me
☐ One dozen Jade plus free catalogue. $4
☐ Deluxe sampler of 22 leading condoms plus catalogu
☐ Illustrated catalogue alone. 25¢

Many ways to order: __ Cash or check enclosed
__ BankAmericard __ Master Charge
Account No _____ Card expires _____
Signature _____
Name _____ Address _____
City _____ State _____ Zip _____

CONTRACEPTION
A JOINT RESPONSIBILITY

Birth control is a personal, private matter. That is why Population Planning offers a broad line of contraceptives – for men and women – by mail. The information in our catalog assists you in making a knowledgeable choice from the many leading brands of contraceptives. Delfen and Emko foam, gels, creams, rhythm aids, a lab pregnancy test, and books on birth control and sexuality. For women who believe men should share the responsibility of birth control we offer 20 of the best known male contraceptives, including the popular Trojan, sensitive Conture, and exciting new Jade – all at very attractive prices. Send just 25¢ for our illustrated catalog describing the products and services we have brought to over 50,000 satisfied customers, or send $3 for a sampler of 12 assorted condoms and catalog; all sent in a plain, attractive package. Satisfaction guaranteed (or your money back).

Population Planning, Dept. 00000
105 N. Columbia, Chapel Hill, N.C.
27514

☐ Please send me the deluxe sampler of 12 assorted male contraceptives plus catalog. Enclosed is $3.
☐ Please send illustrated catalog only. Enclosed is 25¢.

NAME _____
STREET _____
CITY _____ STATE ____ ZIP ____

Affidavit of Dr. Anna T. Rand.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Dr. ANNA T. RAND, being duly sworn, deposes and says:

1. I am one of the physician-plaintiffs in this lawsuit which seeks a declaration of unconstitutionality and an injunction against the enforcement of § 6811(8) of the New York State Education Law with respect to its applicability to non-prescription contraceptives. My academic credentials and professional qualifications are set forth in paragraph "4" of the complaint. This affidavit is submitted in support of the plaintiffs' application requesting the convening of a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284.

2. As set forth in the complaint, in my capacity as Director of Family Planning at The Albert Einstein College of Medicine and at Bronx Municipal Hospital, I am very extensively involved in family planning programs, and in the problems confronting physicians who deal with this aspect of health care. The population from which my patients are drawn has a high rate of unwanted pregnancy, abortions and venereal disease. My patients include large numbers of sexually active adolescents under the age of sixteen.

3. The statute in question, § 6811(8) of the Education Law, interferes with and frustrates the exercise of my pro-

fessional medical judgment and the implementation of sound medical practice in a number of significant respects.

a. It is a fact of life in New York City and in New York State, of which all physicians who deal in this area are aware, that there are large numbers of persons who are sexually active and who do not utilize birth control devices, but who would use birth control devices if they were more generally available.

b. I encounter in my professional practice considerable incidence of venereal diseases, frequently arising from sexual intercourse without the use of a condom, under circumstances where were a condom utilized, the likelihood of venereal disease would be greatly lessened.

c. Such sexual activity without utilization of birth control devices results in a large number of unwanted pregnancies, a significant portion of which are terminated by abortions.

d. The limitation of sale of birth control devices, and particularly condoms and foam, to licensed pharmacists, reduces the number of available outlets for such devices and obviously increases the likelihood of sexual activity without contraception and consequent exposure to unwanted pregnancy, abortion and venereal disease.

e. The complete ban on the sale of such devices to minors under the age of sixteen, virtually insures increased venereal disease, unwanted pregnancy and abortion among such persons.

f. In my professional opinion, it is medically essential to increase the availability of and accessibility to these devices, particularly condoms and foam and particularly to patients such as those whom my colleagues and I see at my clinic.

g. I therefore believe that it is medically contraindicated to restrict the distribution of these sales to licensed pharmacists. These non-prescription devices should be available for purchase, at reasonable prices, at any retail establishment, as is the case with such other non-prescription devices and items as band-aids and aspirin.

h. The restriction on the sale to minors is medically even worse since it permits thousands of unwanted pregnancies and abortions which would otherwise have not occurred.

i. Probably most frustrating and harmful in terms of public health, is the complete prohibition of advertising and display of these devices. There is considerable and widespread ignorance concerning these devices and their efficacy, especially among persons who most need this information. Advertising and display and the consequent educational effect is prohibited by law regardless of whether the advertising is commercially oriented or part of a public health information program.

j. These prohibitions have an even more insidious effect in smaller suburban and upstate communities where the availability of birth control devices may be completely dependent on the limited hours of operation of a single pharmacy which may be located at some far distance from the consumer.

k. From the viewpoint of sound preventive medicine, as well as specifically from the viewpoint of the health of my patients, all three statutory restrictions should be eliminated.

l. My colleagues and I are deterred and chilled from public education, including the stimulation of public interest advertising concerning the accessibility and efficacy of these devices, all of which are vitally necessary as public health measures.

Affidavit of Dr. Anna T. Rand.

m. We are likewise deterred and chilled from advising sexually active adolescents to ask to purchase condoms and foam at pharmacies because any sales to them would be unlawful under the present statute.

4. The statute therefore prevents me from properly carrying out my lawful and ethical professional duties and obligations, namely, to give the best medical advice of which I am capable.

5. I have been advised by counsel that there is a substantial question as to whether § 6811(8) is constitutional in light of recent decisions of the Supreme Court and that in order to enjoin the enforcement of a State statute for repugnancy to the United States Constitution, it is necessary to convene a statutory three-judge court.

WHEREFORE, it is respectfully requested that this Court enter an Order convening a three-judge Court.

(Sworn to by Anna T. Rand, June 20, 1974.)

Opinion and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE, and Population Planning ASSOCIATES, INC.,

Plaintiffs,

v.

MALCOLM WILSON, individually and as Governor of the State of New York; LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York; ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

APPEARANCES:

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By: MARVIN M. KARPATKIN and
MICHAEL N. POLLET, Esqs.
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Attorneys for Plaintiffs

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Attorneys for Defendants

LAWRENCE W. PIERCE, D.J.

Plaintiffs in this action seek a judgment declaring Section 6811(8) of the Education Law of the State of New York to be unconstitutional as violative of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, to the extent that the section is applied to non-prescription contraceptives. They also seek preliminary and permanent injunctions against enforcement of the section to that extent. Jurisdiction is grounded on 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2281 and 2284, and 42 U.S.C. § 1983.

Plaintiffs have moved this Court for an order empanelling a three-judge district court to hear the case. Defendants oppose the motion and, in addition, have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (FRCP). For the reasons detailed below, the plaintiffs' motion is granted and the defendants' motion is denied.

The complaint contains a single count. Seven plaintiffs are named. Plaintiff, Population Services International (hereinafter PSI), is alleged to be a North Carolina non-profit corporation whose primary objectives are to discover and implement new methods of conveying birth control information and services to persons not now receiving them with the ultimate goals of reducing unwanted pregnancy, fertility and population growth. Its activities include test marketing, product development, advertisement and display of contraceptives. Its activities occur in the United States, including the State of New York. Part of its funds for educational, scientific and research activities is allegedly received from federal grants and contracts.

Plaintiff, Dr. Anna T. Rand, is a physician licensed to practice medicine in New York State. She is alleged to be the Director of Family Planning at Albert Einstein College of Medicine and at Bronx Municipal Hospital, both in New

York City. Her family planning programs include the distribution of contraceptives. Her patients in such programs include sexually active persons who are under the age of sixteen.

Plaintiff, Dr. Edward Elkin, is a physician licensed to practice medicine in New York State. It is alleged that he practices medicine as a pediatrician and physician for adolescents at the Adolescent Clinic at Mount Sinai Hospital in New York City, where he treats sexually active adolescents under and over the age of sixteen.

Plaintiff, Dr. Charles Arnold, is a physician licensed to practice medicine in New York State. It is alleged that his primary professional interests include family planning and the establishment of programs for the distribution of contraceptive devices to sexaully active adolescents over and under the age of sixteen.

Plaintiff, Reverend James B. Hagen, is an ordained minister of the Protestant Episcopal Church. He is alleged to be the Coordinator of the Sunset Action Group Against V.D., the sponsor of a program in which male contraceptive devices are sold and distributed, both at the church and at a local retail outlet which is not a licensed pharmacy, to residents of Brooklyn, New York, who are over and under the age of sixteen.

Plaintiff, John Doe, alleges that he is forty-three years of age, is married, has four children and engages actively in sexual conduct.

Plaintiff, Population Planning Associates (hereinafter PPA), is a North Carolina corporation which maintains an office in the County, City and State of New York. It is alleged to be primarily engaged in the retail sale of non-medical contraceptives through the United States mails. PPA advertises its products in national periodicals entering New York State and occasionally places such advertisements in local periodicals in New York State.

The challenged statute reads:

> "Sec. 6811. Misdemeanors
> It shall be a class A misdemeanor for:
> . . .
> 8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited;".

Plaintiffs urge that by virtue of the restrictions and prohibitions of the challenged statute, irreparable harm and incalculable damage result to each of them, to the public and to persons under age of sixteen. PSI and PPA contend that their objectives, *supra,* are being thwarted and chilled as a result of the statute. Drs. Rand, Elkin and Arnold, contend that their work with patients under and over age sixteen is directly affected by the subject law which prohibits the distribution by them of non-prescription contraceptives to adults as well as to minors. Reverend Hagen claims his work is similarly restricted. John Doe states that he is directly affected in his own sexual activities since he is unable to purchase contraceptives at retail outlets other than those operated by licensed pharmacists, of which the nearest is two miles from his family residence. Further, he states that he and his wife have four children, two of whom are under the age of sixteen, and that hi right of privacy and liberty in matters related to educating his children about contraceptives is restricted. And he asserts that his right of privacy and liberty with respect to

family planning, marriage and sex is violated and unduly burdened.

PPA has received three written communications from the State Board of Pharmacy. The first, dated December 1, 1971, informed PPA that an advertisement it had placed in a publication issued at a New York State college which solicited the sale of male contraceptives was a violation of the statute in question and sought PPA's "future compliance with [the] law." The second, dated February 23, 1973, asserted that PPA was not complying "with our law" by virtue of its "solicitation of . . . sales of contraceptives for men via magazine ads through the mails. . . ." It sought PPA's compliance with the subject law and stated, "In the event you fail to comply the matter will be referred to our Attorney General for legal action." The third, dated September 4, 1974, is a report of violation of the subject law made by State Board of Pharmacy inspectors, following a visit to PPA's New York office.

The motion before the Court seeks the convening of a three-judge court to consider this action and to hear the plaintiffs' motion for injunctive relief against enforcement of § 6811(8). The single district judge to whom such a request is made must consider whether a basis exists to convene a three-judge panel. The test to be applied is "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962); *Nieves* v. *Oswald,* 477 F.2d 1109, 1111 (2d Cir. 1973).

The complaint seeks a declaration that § 6811(8) of the New York State Education Law is unconstitutional, insofar as it is applicable to non-prescription contraceptives, and an injunction against its enforcement to that extent. Clearly this claim meets the requirements of 28 U.S.C.

§§ 2281 and 2284. The complaint also at least formally alleges a basis for equitable relief. As the Supreme Court recently stated:

> "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the [federal] plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel* v. *Thompson,* 415 U.S. 452, 462 (1974).

Plaintiffs here are in just such a situation.

The sole remaining question, therefore, is whether the constitutional claims set forth in the complaint are so constitutionally insubstantial as to require dismissal of the complaint. *Goosby* v. *Osser,* 409 U.S. 512 (1973) instructs that:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' . . . 'wholly insubstantial,' . . . 'obviously frivolous,' . . . and 'obviously without merit,' . . . The limiting words 'wholly' and 'obviously' have cogent legal significance. To the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Id.* at 518.

This definition describes the powers of a single judge to dismiss a complaint where an injunction is sought on the basis of unconstitutionality "in the most limiting terms the

Court has ever used." *Roe* v. *Ingraham,* 480 F.2d 102, 106 (2d Cir. 1973). It is under this standard that the plaintiffs' challenges to the three provisions of the statute—the prohibition against sale or distribution to any person under the age of sixteen, the prohibition against sale or distribution to any person by someone other than a licensed pharmacist, and the absolute prohibition against advertisement and display—must be measured.

Plaintiffs base their challenge to the statute principally on the right to privacy. The existence of a constitutional right to privacy, shielding certain areas of human activity from governmental intrusion, was first recognized in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). There, in a case involving a married couple, the Court struck down a Connecticut statute prohibiting the use of contraceptives. In subsequent decisions, the Court has recognized further dimensions to this right. See *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) (right of single persons to have access to contraceptives on the same basis as married persons); *Roe* v. *Wade,* 410 U.S. 113 (1973) ("fundamental" constitutional right of a woman to terminate her pregnancy, subject to regulation only by a "compelling" state interest); *Doe* v. *Bolton,* 410 U.S. 179 (1973) (right of a pregnant woman to make an abortion decision based on consultation with her doctor alone). Thus, constitutional protection has been extended to the most intimate phases of personal life, having to do with sexual intercourse and its possible consequences. See *Rosenberg* v. *Martin,* 478 F.2d 520, 524 (2d Cir.), *cert. denied,* 414 U.S. 872 (1973).

"If there is anything 'obvious' about the constitutional right to privacy at the present time, it is that its limits remain to be worked out in future cases." *Roe* v. *Ingraham, supra* at 108. See Note, *On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U.L. Rev. 670 *passim* (1973). Neither *Griswold* nor *Eisenstadt* explicitly ex-

tended constitutional protection to the interest plaintiffs seek to have recognized here, i.e., an unlimited right to distribute and have access to contraceptives. There can be no doubt, however, that for the purposes of this motion, there is a substantial question as to whether such a constitutional right exists.

The existence of a privacy right in this case, however, would not necessarily require invalidation of state regulation of the protected activity. See *Roe* v. *Wade, supra* at 155-56. Therefore, the fact that each of the three challenged provisions limits access to and the distribution of contraceptives in some way does not automatically make them constitutionally suspect. However, if the exercise of a "fundamental" right is involved, it may be regulated only to the extent that regulation is justified by a "compelling" state interest. See *id.*, at 153-54. And, where governmental regulation of a constitutionally protected area is permissible, the regulation must be sufficiently narrow in scope so as to express only legitimate state interests. See *Griswold* v. *Connecticut, supra* at 485; *NAACP* v. *Alabama,* 377 U.S. 288, 307 (1964). As detailed below, questions exist, which are clearly sufficient to meet the test of *Goosby* v. *Osser, supra,* as to whether any one of the aspects of the statute challenged here meets these criteria.

Prohibition of Sale or Distribution by Anyone Other Than a Licensed Pharmacist

In its papers, the State of New York advances two arguments in support of the regulation prohibiting sale or distribution to any person by anyone other than a licensed pharmacist. The first, not pressed at oral argument, is that this is a rational health measure facilitating quality control and allowing for professional advice to be given concerning the various items available.

It is difficult to see what control can be exercised by pharmacists or any other retailers over the quality of what are generally pre-packaged items. Nor is it apparent why professional advice is more necessary with respect to these products than with respect to the many other non-prescription devices and patent medicines which are widely distributed by both pharmacists and non-pharmacists. Even if a reason were shown for having such advice available, it is not at all clear to the Court what unique qualifications licensed pharmacists possess which prepare them to give professional advice as to the use of contraceptives.

The second justification proffered is that the limitation makes it easier for the State to enforce the prohibition against distribution to persons under the age of sixteen. Assuming that prohibition would itself be a legitimate state end, there appears to be no reason why it could not as easily be effected through grocers and other groups of retailers, thus making the products more readily available to persons who are entitled to purchase them if they choose to do so.

Having considered the justifications presented by the State, the Court finds that a not insubstantial question is presented as to whether prohibiting the sale of non-prescription contraceptives by anyone other than a licensed pharmacist unconstitutionally burdens the exercise of a protected right.

Prohibition of sale or distribution to minors under sixteen

In support of the statute's absolute prohibition of the sale of non-prescription contraceptives to persons under sixteen, New York suggests that its goal is to limit teenage extramarital sexual activity. The State then argues that although there is no evidence that such activity increases

in proportion to the availability of contraceptives, unless such a link is explicitly disproved, it is not irrational for the legislature to restrict access to contraceptives in the hope of limiting that activity.

As a starting point, it is clear that the mere fact that a person is a minor does not except him from the protections of the Constitution. See *In re Gault,* 387 U.S. 1 (1967). "The fact that [persons] are juveniles does not in any way invalidate their right to assert their Constitutional right to privacy." *Merriken* v. *Cressman,* 364 F.Supp. 913 (E.D. Pa. 1973). Therefore, an immediate question with respect to this provision is whether the State's asserted interest in limiting teenage extramarital activity is of sufficient magnitude to justify the burden placed on these individuals' right to privacy.

The State argues that even where there is an invasion of protected freedoms, the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, citing *Ginsberg* v. *New York,* 390 U.S. 629 (1968) and *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). Those cases dealt, respectively, with limiting the access of persons under seventeen to sexual materials which might be harmful to them even though not obscene for adults, and with barring children from certain types of employment on the streets and in public places. In contrast to the situations there, cogent arguments are advanced here that the prohibited articles might serve as a positive good for the minors affected, in that access to them might diminish the incidence of venereal disease and unwanted pregnancy for persons in the affected age group.

The State disputes these contentions, but this is not the appropriate place to attempt to resolve the dispute. Suffice it to say that a not insubstantial question has been raised as to whether this provision unconstitutionally infringes the right to privacy of New York State residents under the age of sixteen.

Even if it were to be assumed for present purposes that limiting or restricting teenage extramarital sexual activity is a legitimate State objective and that the prohibition at issue is a rational way to pursue that end, there would remain a question as to whether the State has drawn its categories here in conformity with the requirements of the Constitution.

Under the Equal Protection Clause of the Fourteenth Amendment, a classification, to be reasonable and not arbitrary, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike.*" *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) (emphasis added). See *Eisenstadt* v. *Baird, supra* at 446-47; *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971). There may be a substantial question in this case as to whether the State has drawn its lines in a fashion commensurate with this standard. However, since the Court has already found a sufficient question under the privacy standard to require submitting this provision to a three-judge panel, it is not necessary to explore the Equal Protection question further here.

Prohibition of Advertisement or Display

The third and final provision challenged, insofar as it applies to non-prescription devices, is the absolute ban on the display and advertising of contraceptives. It is clear that where information relating to the exercise of a constitutional right is involved, the fact that the information is in the form of an advertisement or may be tied to commercial activity does not deprive it of the First Amendment protection accorded communications and expressions of ideas. See *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U.S. 376, 384 (1973); *Ginzburg* v. *United States,* 383

U.S. 463, 474 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). In the face of this authority, there is certainly a question sufficient to meet the *Goosby* v. *Osser*, *supra*, standard as to whether New York's *complete* ban on advertising and display violates the First Amendment. Such a complete ban may also impermissibly inhibit any existing privacy right to distribute and have access to contraceptives.

CONCLUSION

The Court has found a sufficient question as to the constitutionality of each of the three challenged provisions of § 6811(8), as applied to non-prescription contraceptives, to require submission of the issues to a three-judge district court. Accordingly, the Court declines to dismiss any part of the complaint and the defendants' motion for judgment on the pleadings pursuant to Rule 12(c) FRCP is denied. The plaintiffs' motion requesting the convening of a three-judge court is hereby granted. The request will be forwarded to the chief judge of this circuit upon filing of this opinion and order.

SO ORDERED.

Dated: New York, New York
October 23, 1974

LAWRENCE W. PIERCE
U.S.D.J.

Notice of Motion for Summary Judgment and Plaintiffs' Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon all the pleadings, papers and memoranda of law heretofore filed herein, and all of the affidavits and the exhibits annexed thereto, including the affidavit of Diana Altman, sworn to on May 29, 1974; the affidavit of Philip D. Harvey, sworn to on May 24, 1974; and the affidavit of Dr. Anna T. Rand, sworn to on June 20, 1974 (all annexed to the plaintiffs' motion of June 21, 1974 seeking a three judge court); and the annexed statement of material facts as to which plaintiffs contend that there is no genuine issue to be tried, the plaintiffs pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court for an order granting summary judgment in the plaintiffs' favor on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law. At the oral argument before this Court on January 23, 1975, plaintiffs made an oral motion for summary judgment. At the request of the Court, plaintiffs now file this motion for summary judgment to support the oral motion made hereinbefore.

Based upon the foregoing, plaintiffs move that an order granting summary judgment for plaintiffs for all of the

relief demanded in the supplemental complaint, be entered by this Court.

Dated: New York, New York,
February 13, 1975.

Yours, etc.,

KARPATKIN, POLLET & LEMOULT

By .....
Michael N. Pollet
Attorneys for Plaintiffs

To: HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Attn.: Arlene Silverman, Esq.

STATEMENT OF THE MATERIAL FACTS AS TO WHICH THE PLAINTIFFS CONTEND THERE IS NO MATERIAL ISSUE TO BE TRIED PURSUANT TO RULE 9(g) OF THE GENERAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Plaintiffs contend that as to the following material facts, there is no genuine issue to be tried:

1. Plaintiffs are as follows:

(a) POPULATION SERVICES INTERNATIONAL, a not-for-profit, tax-exempt corporation wholly devoted to implementing and developing family planning and birth control programs which desires to advertise, display and distribute

non-medical contraceptives outside of a pharmacy to New York residents both over and under the age of sixteen (Altman Affidavit, ¶¶ 4, 7 and 8);

(b) DR. ANNA T. RAND, DR. EDWARD ELKIN, and DR. CHARLES ARNOLD, three physicians active in family planning, pediatrics and obstetrics-gynecology, who treat sexually active adolescents both over and under the age of sixteen, and who advocate the distribution of non-medical contraceptives through non-pharmacy outlets (Rand Affidavit, ¶¶ 2 and 3; Supplemental Complaint, ¶¶ 4, 5 and 6);

(c) THE REVEREND JAMES B. HAGEN, an Episcopal priest who coordinates a program combatting venereal disease in which contraceptives are distributed to minors, including those under the age of sixteen (Supplemental Complaint, ¶ 7);

(d) JOHN DOE, a married resident of New York State who is the father of four children, two of whom are under the age of sixteen, and who lives at some distance from the nearest licensed pharmacist (Supplemental Complaint, ¶ 8); and

(e) POPULATION PLANNING ASSOCIATES, INC., a North Carolina corporation whose principal business is the mail order retail sale of non-prescription contraceptives, which has been threatened with prosecution for advertising its services and for selling non-prescription contraceptives in New York State (Supplemental Complaint, ¶¶ 9, 13, 14 and 14(a); Harvey Affidavit, ¶ 5).

2. Each plaintiff is chilled in the exercise of his or her chosen activity as a result of New York Education Law § 6811(8). These activities include the advertising, display, sale and distribution of non-prescription contracep-

tives to males and females over and under the age of sixteen. (See, e.g., Altman Affidavit, ¶ 8; Harvey Affidavit, ¶¶ 5, 6; Rand Affidavit, ¶¶ 3(1) (m), 4).

3. Each plaintiff is subject to criminal penalties under § 6811(8) for his or her activities and as an advocate of the freedom to use contraceptives, since the statute is aimed and operates directly at each of them.

4. Plaintiff Population Planning Associates, Inc. (PPA) has received two warning letters from defendant, Sica, one of which directly threatened criminal prosecution. Plaintiff PPA has also been visited at its New York office by two inspectors of the defendant Board of Pharmacy, at which time defendant's inspectors explicitly threatened legal action against PPA for advertising non-prescription contraceptives in a national magazine, and for offering such products for sale in New York. (Harvey Affidavit, ¶ 5; Supplemental Complaint, Exhibits A and B; Stipulation, September 25, 1974).

5. § 6811(8) is not moribund. It was reenacted in 1971, and amendments to it were heatedly debated in 1972, 1973 and 1974, after each of which the validity and purposes of § 6811(8) were reaffirmed, and amendments seeking to ameliorate certain of the unconstitutional effects of the law were defeated. (See, Defendants' Exhibit handed up to the Court at oral argument; Plaintiffs' Reply Memorandum, Exhibit A).

6. While there are no officially reported prosecutions under § 6811(8), there are three reported prosecutions under its predecessor statute, § 1142 of the Penal Law, the last of which was in 1965. (Plaintiffs' Reply Memorandum, p. 3).

7. There is no evidence whatsoever of any health or welfare necessity requiring that pharmacists alone be permitted to sell non-prescription contraceptives. Indeed, there is strong evidence to the contrary, that non-prescription devices are harmless and are dispensable as is any other commodity, through normal retail or other channels, particularly since the Federal government itself regulates non-prescriptiton contraceptives (21 U.S.C. § 321(h); Rand Affidavit, ¶ 3(g); Plaintiffs' Memorandum in Support of Plaintiffs' Motion for a Three Judge Court, p. 12). There is also evidence that limiting sales to pharmacies places a heavy burden upon ease of access to contraceptives, thus restricting the conceded beneficial effects of contraceptives to those minors or adults who do engage in sexual activity regardless of the availability of contraceptives. (Rand Affidavit, ¶ 3(d), (e), (g)).

8. There is evidence on the record to show that there is absolutely no difference in the effects of unprotected intercourse upon minors under the age of sixteen and its effects upon adults. Most evidence appears to show, in fact, that the effects of such intercourse upon minors are more severely deleterious than they are to adults. Many teenage girls under the age of sixteen in New York State become pregnant as a result of unprotected intercourse, and their pregnancies, births or abortions subject them to increased medical dangers because of their youth. Their babies, if born, are more likely to be subject to severe physical deficiencies or congenital diseases, as well as economic and emotional deprivation (American Civil Liberties Union *amicus curiae* Memorandum of Law, pp. 1-16). Aside from the problems of pregnancies and parenthood, young teenagers are increasingly subject to the debilitating effects of venereal diseases as a result of un-

protected intercourse (Plaintiffs' Reply Memorandum, pp. 14-15; American Civil Liberties Union *amicus curiae* Memorandum of Law, p. 12). Venereal disease levels have reached the epidemic stage in New York state, and evidence shows they would be likely to drop if access and use of contraceptives increased. Therefore, on a medical level, there are no possible grounds for distinction between minors and adults as far as the dire effects of unprotected intercourse, or the beneficial effects of the use of contraceptives.

9. There is absolutely no evidence in the record that teenage extra-marital sexual activity would increase if contraceptives were available. The scientific and statistical data in the record is, in fact, overwhelmingly to the contrary, and indicates that there is apparently no relation between access to contraceptives and incidence of intercourse, except that perhaps knowledgeable use of contraceptives leads to more responsible sexual behavior (Defendants' Memorandum in Opposititon to Plaintiffs' Motion for a Three Judge Court, p. 23; Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for a Three Judge Court, pp. 25-27).

10. There is evidence on the record to show that New York State permits minors access to remedial treatment for unprotected intercourse, such as abortions or treatment for venereal disease, while denying minors access to the preventive treatment by means of contraceptives (American Civil Liberties Union *amicus curiae* Memorandum of Law, pp. 23-25).

11. There is evidence on the record to support the contention that restrictions upon the availability of informa-

tion concerning contraceptives is likely to have a negative effect upon knowledge and use of contraceptives among those who would otherwise desire them (Plaintiffs' Reply Memorandum, pp. 19-20; Rand Affidavit, ¶ 3(i)).

Dated: New York, New York
February 13, 1975

KARPATKIN, POLLET & LEMOULT

By .....
Michael N. Pollet
Attorneys for Plaintiffs

Defendants' Statement Pursuant to Rule 9(g).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, as and for their statement pursuant to General Rule 9-g of the Southern District of New York and in opposition to plaintiffs' 9-g statement, respectfully allege:

1. Defendants dispute paragraph "1", of plaintiff's 9(g) statement except admit that an organization calling itself Population Planning Associates maintains an office on E. 56th Street, New York, New York. More particularly defendants deny the materiality of paragraphs 1(b) and 1(e).

2. Defendants dispute paragraphs "2" and "3" of plaintiffs' 9(g) statement.

3. Defendants dispute paragraph "4" of plaintiffs' 9(g) statement except admit that Population Planning Associates received two letters from defendant Sica, but dispute materiality thereof and admit that two of defendants' inspectors visited PPA at its New York office.

4. Defendants dispute paragraph "5" except admit that § 6811(8) was enacted in 1971 and that amendments which were defeated were debated in 1972, 1973 and 1974 but deny the materiality of the mere fact of reenactment.

5. Defendants deny the materiality of paragraph "6".

Defendants' Statement Pursuant to Rule 9(g).

6. Defendants dispute paragraphs "7", "8", "9", "10" and '11" and deny the materiality thereof.

Dated: New York, New York
February 28, 1975

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

ARLENE R. SILVERMAN
ARLENE R. SILVERMAN
Assistant Attorney General

Affidavit of Philip D. Harvey.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP D. HARVEY, being duly sworn, hereby deposes and says:

1. I am the President of Population Planning Associates, Inc. ("PPA"), one of the plaintiffs in this lawsuit, and I submit this affidavit for the purpose of confirming and offering into evidence, the allegations set forth in paragraph 14(a) of the supplemental complaint.

2. As stated in paragraph 14(a) and confirmed in Exhibit D annexed to the supplemental complaint (the written report prepared by an inspector of the Board of Pharmacy), two inspectors, engaged and employed by the defendants Board of Pharmacy of the State of New York and Albert J. Sica, visited the New York office of plaintiff PPA on September 4, 1974. During this visit, the inspectors advised me that a PPA advertisement which appeared in the September, 1974 issue of "Playgirl" magazine, and which advertised and solicited sales of non-medical male contraceptives, as well as prescription required birth control pills, was in violation of the New York State Education Law. The inspectors stated that PPA could not lawfully sell or advertise either non-medical contraceptives which do not require a prescription or prescription required contraceptives.

3. The inspectors further stated that if plaintiff PPA persisted in its sales, advertisement or distribution of prescriptiton contraceptives and non-medical contraceptives, that "we will institute action". I construed their statetments as a direct threat of prosecution if plaintiff PPA was to continue to engage in its constitutionally protected activities of selling, advertising and distributing non-medical contraceptives. This threat was further made perfectly clear by the form filled out by one of the inspectors and left with me, annexed to the supplemental complaint as Exhibit D. In said form, the inspector checked off two alleged violations of the New York State Education Law for soliciting prescriptions and advertising for contraceptives. The form further states that I was "advised to stop advertising for prescriptions and to stop selling contraceptives—it is a violation of the New York State Education Law."

4. At the time the inspectors visited plaintiff PPA's office, they requested and took with them one of PPA's catalogs which advertises the sale solely of non-medical contraceptives which do not require prescriptions.

I have annexed to this affidavit a catalog identical to that requested and taken by the inspectors, as Exhibit A.*

(Sworn to by Philip D. Harvey, March 5, 1975.)

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* Included in Record on Appeal.

Affidavit of Reverend James B. Hagen.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COUNTY OF KINGS
STATE OF NEW YORK } ss.:

The REVEREND JAMES B. HAGEN, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I submit this affidavit for the purpose of confirming and offering into evidence the allegations set forth in paragraph 7 of the supplemental complaint.

2. I am an ordained Minister of the Protestant Episcopal Church, and am currently Rector of St. Andrews Episcopal Church, located at 4917 Fourth Avenue, Brooklyn, New York.

3. I am the Coordinator of the Sunset Action Group Against V. D. Under my direction, this group sponsors a program in which male contraceptives are sold and distributed at the Rectory of the church to local residents, both over and under the age of sixteen. The Rectory of the church is not a licensed pharmacy, nor am I a licensed pharmacist.

4. Section 6811 of the New York Education Law which prohibits these activities, chills and deters me from further similar activities, which I believe to be protected by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

(Sworn to by James B. Hagen, March 6, 1975.)

Affidavit of Victor J. D'Amico.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

VICTOR J. D'AMICO, being duly sworn, deposes and says:

1. I am a Pharmacy Inspector with the New York State Board of Pharmacy. As an Inspector, my function is to investigate methods and procedures for handling and disposing of drugs and devices as described in the New York State Education Law, Article 137.

2. On September 4, 1974, at approximately 2 p.m., I visited the offices of Population Planning Associates at 120 E. 56th Street, New York, N.Y. pursuant to the instructions of Samuel Kirschenbaum, Senior Inspector in charge of the New York City office. I was accompanied by Inspector Mitchell DuBroff who was in training at the time and was there to observe. Mr. Kirschenbaum supplied me with an advertisement which had appeared in Playgirl magazine. The advertisement is annexed hereto.*

3. I introduced myself to an individual at the offices of Population Planning Associates who identified himself as Philip D. Harvey, President of Population Planning Associates. I showed Mr. Harvey the advertisement for birth control pills which had appeared in Playgirl magazine.

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* See Exhibit C of Supplemental Complaint.

Affidavit of Victor J. D'Amico.

4. Mr. Harvey informed me that Population Planning Associates solicits prescriptions for birth control pills. These prescriptions must be pre-paid and are forwarded to Kansas for filling. I told him that this procedure is illegal in New York State. I explained that only a pharmacy registered in New York State which employs a registered pharmacist can accept and fill prescriptions.

5. I pointed out to him that the advertisement also solicited orders for male contraceptives. Mr. Harvey explained that the orders which he receives for male contraceptives are forwarded to the home office of Population Planning Associates in Chapel Hill, North Carolina. I explained to Mr. Harvey that this practice was also in violation of the New York State Education Law.

6. I informed Mr. Harvey that I would report the facts as I see them to my office. As an Inspector, it is not my function to recommend or institute legal action. I did not inform Mr. Harvey that "we will institute legal action", nor did I hear Mr. DuBroff make any such statement.

(Sworn to by Victor J. D'Amico, March 10, 1975.)

Judgment and Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1572

POPULTION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. [illegible]GEN, JOHN DOE, and POPULATION PLANNING ASSOCIATES, INC.,

Plaintiffs,

—v—

MALCOLM WILSON, individually and as Governor of the State of New York; LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York; ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Defendants.

Upon the pleadings, the plaintiffs' motion for summary judgment and affidavits submitted in connection therewith, the defendants' motion to dismiss the complaint and affidavits submitted in connection therewith, and having heard oral argument and having considered the memoranda of law submitted by the parties, and upon all proceedings held herein, and in accordance with the opinion filed on July 2, 1975,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiffs' motion for summary judgment is granted and the defendants' motion to dismiss the complaint is denied;

2. Section 6811(8) of the New York State Education Law ("the Act"), insofar as it applies to non-prescription contraceptives, is hereby declared to be unconstitutional in its entirety under the First and Fourteenth Amendments;

3. Defendants, their officers, agents, servants, employees and all those acting in concert with them, are hereby permanently enjoined from enforcing the provisions of the Act as it is applied to non-prescription contraceptives. With respect to that provision of the Act which prohibits the sale or distribution of non-prescription contraceptives to persons under the age of sixteen, the injunction shall become effective upon entry of judgment herein. As to those provisions of the Act which prohibit sale or distribution of non-prescription contraceptives by anyone other than a licensed pharmacist and prohbits advertisement and display of such products, the injunction is stayed for 120 days following entry of judgment herein.

Dated: New York, New York
July 16th, 1975.

HENRY J. FRIENDLY
FRIENDLY, H.J., Circuit Judge

L.W. PIERCE
PIERCE, L.W., District Judge

WILLIAM C. CONNER
CONNER, W.C., District Judge

JUDGMENT ENTERED—7/18/75
RAYMOND J. BURGBARDT
Clerk

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

—against—

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

MICHAEL N. POLLET
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1345 Avenue of the Americas
New York, New York 10019
Attorneys for Appellees

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Appellants,

—against—

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

The appellees, in accordance with Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the decision below is so manifestly correct and the questions presented so unsubstantial as not to warrant further argument.

Statement

This is a direct appeal from the final judgment and decree entered on July 2, 1975, by a district court of three judges[1] constituted pursuant to 28 U.S.C. §§2281 and 2284.[2] The court declared Section 6811(8) of the New York State Education Law to be unconstitutional under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, and permanently enjoined enforcement of such statute.[3] Section 6811(8) reads as follows:

"It shall be a class A misdemeanor for:

• • • • •

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited."[4]

---

[1] Consisting of Senior Circuit Judge Friendly, and District Judges Pierce and Conner.

[2] Appellees' motion seeking an order convening a three-judge court was granted by Judge Pierce in an opinion reported at 383 F. Supp. 543 (S.D.N.Y. 1974).

[3] The statute was challenged—and declaratory and injunctive relief granted—only insofar as the statute affects non-prescription contraceptives and devices. Appellees do not contest the statute with regard to products requiring a prescription.

[4] The injunction as to the advertising and display provisions of the statute was stayed for 120 days in order to enable the state legislature to enact "narrower provisions" to "reflect appropriate constitutional concerns." See Opinion of three-judge court, annexed in appellants' jurisdictional statement as Appendix A (referred to as p. ....a), at p. 29a. The legislature has enacted no such provisions.

Facts

The court below found it clear that the appellees Population Planning Associates and Hagen had standing as plaintiffs; it thus did not reach the question of the standing of the other appellees.[5] The appellees whose standing was considered by the court below are Population Planning Associates, Inc. [PPA], and the Reverend James B. Hagen [Hagen]. PPA is a North Carolina corporation which maintains an office in the County, City and State of New York. It engages in the mail order retail sale of non-prescription contraceptive devices; it publishes advertisements containing order forms for its products in both national and local periodicals circulated in New York State; it approves and fills orders for its products in its North Carolina office and mails these products to New York State residents.

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[5] The other appellees in this action are Population Services International [PSI], Drs. Anna T. Rand, Edward Elkin and Charles Arnold [Doctors], and John Doe. PSI is a North Carolina non-profit corporation with an office in the County, City and State of New York. Its objectives include the discovery and implementation of new methods of delivering contraceptive services and information to persons not receiving them, with the goal of reducing the miseries of unwanted pregnancy, disease and population growth.

The Doctors are physicians active in family planning, pediatrics and obstetrics-gynecology. They treat sexually active adolescents both over and under the age of sixteen and advocate the distribution of non-prescription contraceptives through non-medical and non-pharmacy outlets. John Doe is an adult male resident of New York whose access to contraceptive information and products and whose freedom to distribute the same to his children under the age of sixteen are prohibited by the statute here challenged.

PPA has several times been warned by appellants of the alleged illegality of these activities and threatened with prosecution. On December 1, 1971, a letter from appellant Sica indicated that an advertisement in a New York State college newspaper which allegedly "solicited the sale of condoms to students" was in violation of Education Law §6811(8). The letter demanded "future compliance with the law." A second letter, dated February 23, 1973, asserted that PPA's offer to sell male non-prescription contraceptives through magazine advertisements was also illegal. This letter stated: "In the event you fail to comply, the matter will be referred to our Attorney General for legal action." Finally, on September 4, 1974, PPA's New York office was visited by inspectors from the Board of Pharmacy. PPA's president was advised to stop selling contraceptives because such sale was in violation of the law. The inspectors further warned PPA that its violations of the law would be reported to the Board of Pharmacy, and indeed, such a report was made, and a copy left with PPA.[6]

Appellee Hagen is an ordained Episcopal minister, and rector of a church in New York. He is coordinator of the Sunset Action Group Against V.D., a group which sells and distributes male non-prescription contraceptive products to persons both over and under the age of sixteen in retail outlets which are not licensed pharmacies.

[6] Appellants assert in their jurisdictional statement (p. 9) that no legal action was threatened, that the inspection was only for "information purposes." However, the lower court specifically found that the inspectors threatened to report PPA to the Board of Pharmacy, a threat which was tantamount to a threat of prosecution. See Opinion of three-judge court (p. 5a).

Appellants in this action are the Governor and Attorney General of the State of New York, the Executive Secretary of the Board of Pharmacy of the State of New York, and the Board of Pharmacy. Appellants are responsible for the enforcement of the challenged statute.

Argument

The decision of the three-judge district court should be summarily affirmed. It is plainly correct and based upon well-established principles enunciated by this Court in numerous previous decisions. Such principles, and their application to this case, are so obvious as not to require further argument in this Court.

POINT I

Appellees have standing to challenge Education Law §6811(8), and a case or controversy is presented.

Contrary to appellants' unfounded assertions, it is clear that the court below properly held that appellees PPA and Hagen have standing and that they present a case or controversy.

Appellees are here asserting the privacy and First Amendment rights of those not parties to this action—residents of New York who are intolerably burdened in their access to contraceptives and contraceptive information. The latter have no forum in which to present their claims since the statute which affects their rights does not subject them to prosecution. In such situations it has long been settled that others closely allied in interest with these absent parties may assert their rights. See, e.g.,

N.A.A.C.P. v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1953). This doctrine has been found particularly apposite in cases involving the right of privacy. *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). In these cases several prerequisites are found to the right to assert constitutional *jus tertii.*

In *Griswold* v. *Connecticut, supra,* the seminal case in developing the right of privacy, it was recognized that physicians must be permitted to assert the constitutional rights of married users of contraceptives, because in no other way would there be a forum to assert those rights. The need for an expanded view of standing in such cases was explicitly noted again in *Eisenstadt* v. *Baird, supra,* at 445, fn. 1, in which an advocate of the right to use contraceptives was permitted to assert those rights on behalf of single people.

The Court explained in greater detail the factors which made Baird a proper litigant:

> "[T]he relationship between Baird and those whose rights he seeks to assert is . . . that between *an advocate of the rights of persons to obtain contraceptives and those desirous of doing so* . . . [M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests." 405 U.S. at 445. (Emphasis added.)

And in *Doe* v. *Bolton, supra,* plaintiffs were permitted to raise third party privacy rights in challenging a statute which "directly operated" against them. 410 U.S. at 188.

In the instant case, appellees clearly meet the criteria for standing established by this Court. If these appellees do not have standing, no person could challenge this statute. Appellees are "advocate[s] of the rights of persons to obtain contraceptives," and this litigation will have the important effect of vindicating the rights of those affected persons who are otherwise unable to assert them. The statute "directly operates" against appellees.[7]

Appellants further claim a lack of a case or controversy because appellees have not been prosecuted under the statute. However, this Court has found that an actual prosecution is not essential. *Doe* v. *Bolton, supra.* Indeed, lower courts have recognized that "under *Bolton* . . . all that is required for justiciability and standing is that the criminal statute directly operate against the party seeking relief." *Associated Students for U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, 19 (C.D. Cal. 1973). See also *Friendship Medical Center, Ltd.* v. *Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir.), *cert. den.,* —— U.S. ——, 95 S. Ct. 1438 (1975) (although appellant physicians were actually *in compliance* with the challenged statute, the Seventh Circuit held that the continuing effect of the statute in forcing compliance through fear of prosecution gave the physicians standing). See also *Steffel* v. *Thompson,* 415 U.S. 452 (1974).

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[7] The court below, as noted, did not pass on the standing of appellees PSI, Doctors and John Doe. It is evident, however, that they too have standing. PSI seeks to distribute contraceptives and information about such products and is barred from doing so by Education Law §6811(8), which "directly operates" against it. The Doctors are similarly hampered in distributing contraceptives and information and in their advocacy of the availability of contraceptives in non-medical and non-pharmaceutical places. John Doe is himself hindered in his access to contraceptives and information, and is proscribed from giving the same to his minor children.

It is clear also that appellees' fear of prosecution is far from "chimerical," despite any innocuous intent appellants may ascribe to the threatening communications and visit from the Board of Pharmacy and its inspectors. Therefore, it is irrelevant that they have not yet been prosecuted.[8]

Finally, appellants can hardly claim that Education Law §6811(8) is "moribund." *Doe* v. *Bolton, supra,* at 188. Although there are no officially reported prosecutions under it, there are several prosecutions recorded under its predecessor statute, §1142 of the Penal Law. The last of these was in 1965.[9] The legislature still finds the law of passionate interest; as appellants' own jurisdictional statement declares, long and heated debate has occurred over this statute, resulting in its re-enactment in 1971 and its reaffirmation, after legislative attack, in 1974. The law clearly remains vital.

Even were there no prior prosecutions, this Court has not found the absence of prosecutions, even for nearly forty years, a barrier to the adjudication of the consti-

[8] Appellants' reliance on *Poe* v. *Ullman*, 367 U.S. 497 (1961), ignores the substantial developments embodied in *Doe, Eisenstadt* and *Steffel,* which have occurred with regard to standing since *Poe* was decided. These developments have been particularly marked in the question of third party standing to raise the right of privacy. *Poe* is inapposite, moreover, because there Connecticut clearly had no intention of enforcing its law. Here, appellants themselves have made manifest the State's interest in compliance with Education Law §6811(8).

[9] *People* v. *Baird,* 47 Misc.2d 478, 262 N.Y.S.2d 947 (Sup. Ct. Nassau Co. 1965); *People* v. *Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918), *app. dism.* 251 U.S. 537 (1919); *People* v. *Byrne,* 99 Misc. 1, 163 N.Y.S. 682 (1917). See also Op. Atty. Gen., 45 St. Dept. 308 (1932) (sale of prophylactics in coin machine illegal under §1142).

tutionality of a statute. See *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), recently approved in *Doe* v. *Bolton, supra,* at 188.

It is thus plain beyond peradventure that appellees have standing to raise the privacy rights of third parties, and that a case or controversy is presented, as was decided by the lower court. Standing is equally clear with regard to appellees' First Amendment claims. It cannot now be asserted that the rights of one who wishes to disseminate information are any less weighty than those of one who wishes to receive it. See, *inter alia, Griswold* v. *Connecticut, supra,* at 482-3; *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *New York Times Co.* v. *United States,* 403 U.S. 713, 749 (1971) (Burger, C.J., dissenting); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

POINT II

The constitutional right of privacy includes the fundamental right of access to contraceptives.

The right of privacy, judicially recognized in *Griswold* v. *Connecticut,* and further explicated in *Eisenstadt* v. *Baird, Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* is firmly established. Though neither its precise origins nor its precise reach is yet determined, it seems incontrovertible that it must contain and protect the right of access to contraceptives.

In *Griswold* v. *Connecticut, supra,* this Court first recognized a right of privacy which extended to the use of contraceptives by married couples. The privacy right itself was found to stem from the constitutional guarantees

found in the First, Fourth, Fifth, Ninth and Fourteenth Amendments; it was found in the "penumbras" of those guarantees; in the "fundamental" liberties of the "traditions and conscience of our people"; in values "implicit in the concept of ordered liberty"; and in the concept of "liberty" itself. The marital relationship was found protected by the right of privacy because of its historically inviolate nature. Thus, any law affecting this relationship was required to justify its invasion of the privacy right.

In extending the protection of the right of privacy to unmarried contraceptive users, pursuant to the mandate of the Equal Protection Clause, this Court restated the nature of the right and effectively broadened it beyond the confines of marriage, suggesting that, indeed, the right announced in *Griswold* was the right to engage in sexual intercourse, rather than simply a right explicitly related to marriage. The Court in *Eisenstadt* held, at 453:

> "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."

See also *Note, On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U. L. Rev. 670, 733 (1973) [Hereinafter, *Note, On Privacy*].

Finally, in *Roe* v. *Wade,* the right was found to extend to a woman's decision whether or not to terminate her pregnancy. The personal privacy right, as well as those rights encompassed by it, was termed "fundamental," and any restriction upon it held to be improper unless justified by a "compelling" state interest.

Although there has been some confusion and debate regarding the process by which a right is determined to be fundamental, see, e.g., *Note, On Privacy, supra,* at 701-703, it is clear that personal privacy extends to " 'the most intimate phases of personal life' having to do with sexual intercourse and its possible consequences," *Roe* v. *Ingraham,* 480 F.2d 102, 107 (2d Cir. 1973). See also *Stanley* v. *Georgia,* 394 U.S. 557 (1969) and *Loving* v. *Virginia,* 388 U.S. 1 (1967). Obviously, the right of access to contraceptives is essential to the exercise of the right to use contraceptives, and therefore must similarly be found fundamental and an aspect of the privacy right. See *Note, On Privacy, supra,* at 706 n. 221.

Implicit in this Court's decisions is an understanding that the right to use contraceptives necessarily carries with it a right of access to contraceptives. Clearly, individuals do not have an effective right to use contraceptives unless they have access to them and to information concerning them. Since recognition of a hollow, meaningless right can hardly have been the intention of this Court, it is clear that this Court meant, when it recognized the right of contraceptive use, to recognize the full spectrum of rights which would make the principal right meaningful. In *Griswold,* this Court indicated clearly its understanding of this premise when it declared that specific constitutional rights are insured only by the protection of various peripheral rights, for "without these peripheral rights, the specific rights would be less secure." 381 U.S. at 482-483. In *Griswold* and *Eisenstadt,* this Court implicitly recognized the closely interrelated nature of the right to use and the right to access, by granting standing to represent the rights of *users* of contraceptives to those who in fact provided

access to contraceptives. Thus, inherent in each of these decisions explicating the right to privacy, is the recognition that the broad reach of the personal privacy right encompasses the right to access of contraceptive devices and to information concerning them.[10]

Since the right of access to contraceptives is fundamental, only a "compelling state interest" may justify its infringement.[11] *Roe* v. *Wade, supra.*

Moreover, this Court may find, as did the court below, that it is unnecessary even to reach the question of fundamentality, for the statute here challenged must fall even if evaluated by the intermediate test enunciated by the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir.), *rev'd on other grounds,* 416 U.S. 1 (1974). That test requires that a statute be "carefully scrutinized" if it infringes upon a personal right; it may stand only if closely related in fact to a legitimate state interest. 476

[10] This Court made an analogous finding in *Roe* v. *Wade* and *Doe* v. *Bolton,* in which it was held unconstitutional to prosecute doctors for performing abortions. Had the Court there found a disjuncture between the right to abortion and the right of access to abortion, it would have upheld laws under which doctors were prosecuted, and struck down only those under which pregnant women were prosecuted. It would be anomalous for this Court now to hold with regard to contraceptives that users may not be prosecuted but distributors may.

[11] Appellants err, on page 10 of their jurisdictional statement, by suggesting that the District Court inappropriately applied a test relative to a fundamental state interest. The District Court applied an intermediate test to the right, and since it thereunder found the statute unconstitutional, it had no need to find the right of access to be fundamental, and thus did not reach the issue (pp. 12-13a). Appellants are totally in error, moreover, when they suggest that a "rational relationship" test should have been applied. The District Court clearly and correctly found that the right of access was an aspect of the right to privacy, and its infringement therefore subject to strict scrutiny.

F.2d at 814-815. The court below correctly found that Education Law §6811(8) could not meet this test of close relationship since it furthers no conceivable state interest; thus the question of whether access to contraceptives is fundamental was not reached.

In the instant case, the result is the same whether the strict "compelling interest" test, the intermediate "substantial relationship" test, or even the most lenient and uncritical "rational relationship" test is applied: the statute cannot be shown to have even the most tangential relationship to any legitimate state interest and it must be struck down.

POINT III

Education Law §6811(8) infringes the constitutional right to obtain contraceptives by limiting distribution of non-prescription contraceptives to pharmacists.

Obviously, by limiting sale of non-prescription contraceptives to licensed pharmacists, the statute here challenged severely restricts and limits the right to obtain contraceptives. Therefore, the state interest supporting this statute must be examined to determine whether it is compelling, or legitimate and substantially furthered by the statute, or even rational. Appellees submit that it is none of the above.

Appellants suggest that this provision is justified by administrative convenience, by the need to have knowledgeable persons dispensing contraceptives, and by a "concern that young people not sell contraceptives." The first of these, administrative convenience in enforcing the remainder of the statute, is clearly inapposite, because the entire

statute is unconstitutional. Moreover, even if the other provisions were valid, there is no perceptible reason, as the court below found, why pharmacists can better limit sale to young persons or prevent advertising and display than other storekeepers. Even if they could, mere considerations of administrative convenience here are not so weighty as to permit infringement of constitutional rights. See, *e.g., Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

Indeed, since non-prescription items are here at issue, there is no rational reason why a person with the knowledge and background of a pharmacist is needed to dispense them, as opposed to the numerous other non-prescription products dispensed by the normal panoply of purveyors. The restriction to pharmacists clearly makes the statute overbroad as a health measure, since no health hazards are present with regard to the use of non-prescription devices. *See Eisenstadt* v. *Baird, supra,* at 451:

> "[T]o sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right [to contraceptives]." *Id.* at 464 (concurring opinion).[12]

Finally, the statute is far too overbroad as a means of preventing young persons from *selling* contraceptives.[13] There are much narrower ways of accomplishing the same goal, such as legislating as to the required age of sellers of contraceptives. When it is permissible at all to burden

[12] This provision may not alternatively be upheld as a control on quality. Pharmacists have no control over the quality of the prepackaged contraceptives they receive, which are in any case controlled by the Federal government. See 21 U.S.C. §321(h).

[13] This novel suggestion was neither made nor considered in the court below.

the exercise of a constitutional right, the least restrictive alternative must of course be used. See, *e.g., Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Plainly, none of these purported justifications supports this statute. Even, assuming *arguendo,* that they may seek to further legitimate State objectives, this statute clearly is neither a useful nor a proper nor a rational method of realizing those objectives.[14]

POINT IV

Education Law §6811(8) violates the constitutional rights of minors by prohibiting them from obtaining contraceptives.

Sale and distribution of contraceptives to minors are prohibited by the terms of the statute here challenged.[15] In that respect, the statute violates the privacy rights of minors and the Equal Protection Clause of the Fourteenth Amendment.

[14] Appellants also appear to imply that the statute may stand because it does not seriously infringe appellees' rights. They allege in their jurisdictional statement to this Court (p. 11): "[I]t cannot really be disputed that such products are readily available to these individuals in New York State and appellees have not seriously disputed such fact." Quite to the contrary, appellees *vigorously* dispute such fact. It is disingenuous for appellants to suggest that the law may be preserved because it is not seriously enforced, when these very appellants have sought to enforce the law to the detriment of these appellees.

[15] Appellants have asserted that contraceptives may legally be dispensed to minors by a physician. The lower court found it unnecessary to rule on this issue. Appellees maintain that the plain words of the statute do not permit appellants' interpretation; nevertheless, even if it is correct, a restriction on distribution to minors which permits only distribution by physicians is still an invasion of the rights of minors and likewise constitutionally infirm.

It can no longer be seriously argued, despite appellants' assertions, that "[m]inority as a special classification has always had judicial sanction" (jurisdictional statement, p. 13). Such a claim ignores years of constitutional law. Equal protection of the laws was fully extended to minors in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and the rights of due process in *In Re Gault,* 387 U.S. 1 (1967). The principle that children are entitled to constitutional protection no less than that of adults was reiterated in *Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969) and recently in *Goss* v. *Lopez,* —— U.S. ——, 95 S. Ct. 729 (1975); *Wood* v. *Strickland,* —— U.S. ——, 95 S. Ct. 992 (1975); *Breed* v. *Jones,* —— U.S. ——, 95 S. Ct. 1779 (1975). None of these cases specifically extends the right of privacy to minors; they do, however, unequivocally indicate that minors may not be denied such a fundamental right solely on the basis of their age.

Numerous lower courts have found that minors are fully entitled to the right of privacy. In *T. H.* v. *Jones,* —— F. Supp. ——, Civ. No. 74-276 (D. Utah, July 22, 1975) (three-judge court), a state requirement that minors obtain parental consent in order to have access to contraceptives was invalidated. In a thoughtful opinion the court noted, *inter alia,*

> "[W]e perceive no developmental differences between minors and adults that may affect the gravity of the right asserted by sexually active minors to family planning services and materials. *The interest of minors in access to contraceptives is one of fundamental importance* . . . We hold that the fundamental nature of minors' right to privacy must be considered in assessing the constitutionality of state imposed restrictions on access to contraceptives." Slip Opinion at p. 12. (Emphasis added.)

Many other cases have reached like results. See, *e.g., Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *Wolfe* v. *Schroering,* 388 F. Supp. 631 (W.D. Ky. 1974) (three-judge court); *Coe* v. *Gerstein,* 376 F. Supp. 695 (S.D. Fla.) (three-judge court), *app. dism.* 417 U.S. 279 (1974); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah 1973) (three-judge court); *Merriken* v. *Cressman,* 364 F. Supp. 913 (E.D. Pa. 1973); *Washington* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 272 (1975); *In Re P. J.,* 12 Crim. L. Rep. 2549 (D.C. Super. Ct. 1973). See also *Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy,* 88 Harv. L. Rev. 1001 (1975); *Rights of Choice in Matters Relating to Human Reproduction: Part I of a Symposium on Law and Population,* 6 Colum. Human Rights L. Rev. 1-534 (1974-75); see particularly Paul, *Legal Rights of Minors to Sex-Related Medical Care, id.* at p. 358.[16]

New York State seeks to justify its discrimination against minors by asserting an interest in "heighten[ing] the importance society attaches to a decision to partake in sexual activity at such a young age," (p. 12) and by baldly asserting without any support whatsoever and contrary to the available evidence[17] that "exposure of minors to contraceptives . . . would encourage promiscuity" (p. 14). These goals, even if legitimate, are in no way furthered by Education Law §6811(8).

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[16] Appellants' attempts to support their argument that a state may at will discriminate against a minor are not aided by cases such as *Interstate Circuit* v. *Dallas,* 390 U.S. 676 (1968) and *Ginsberg* v. *New York,* 390 U.S. 629 (1968). These cases concern obscenity and pornography, neither of which is constitutionally protected, while the instant case concerns a fundamentally protected right.

[17] See footnote 10 to Opinion of three-judge court (p. 32a), and accompanying text (p. 15a), and sources cited therein. Appellees find it unnecessary to controvert each of the legislative assertions set forth in appellants' jurisdictional statement at pp. 3-4. Their irrationality and illegitimacy is plain on their faces.

Appellees will first note, as did the court below, that appellants themselves have conceded that "'there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives . . .'"[18] Appellants merely *hope* without rational basis, that Education Law §6811(8) reduces sexual activity by minors. While such a blunderbuss position is conceivably acceptable where no important interest is at stake, it cannot be maintained when a fundamental constitutional right is infringed by the statute in question. This statute, then, may not be justified by such a flimsy state "interest."[19]

Additionally, appellants have not come forward with even a scintilla of evidence to indicate that by restricting a minor's access to contraceptives, the minor will be impressed with the importance of sexual activity. One could much more reasonably posit that a minor who intends to engage in sexual intercourse and finds contraceptives unavailable will find that society advocates sexual activity without responsibility.

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[18] Opinion, at p. 15a.

[19] The State's approach to sexual intercourse by minors is, moreover, somewhat schizophrenic. The State permits a doctor to treat a minor for venereal disease without the consent or knowledge of the minor's parents or guardian. Public Health Law §2305(2). Similarly, it permits a minor to have an abortion without parental consent. Penal Law §125.05. It permits some consensual intercourse by minors, and permits a female to marry below the age of sixteen. N.Y. Dom. Rel. Law §15(2)-(3). And, as noted by the District Court, it makes exceptions to §6811(8), in New York Social Services Law §350(1)(e) and §365-a(3)(e) (pp. 16a, 17a). Finally, if appellants' interpretation of §6811(8) is correct, an exception is also made by permitting doctors to distribute contraceptives to minors. (Appellants' interpretation of the Social Services Law, however, is not evident upon the face of the statute, nor was it ever maintained in the lower courts. Appellants may not be permitted at each judicial level to reinterpret the laws of New York to suit their purposes of the moment.)

Further, as the three-judge court found, the appellants have in no way "challenged the view that when sexual intercourse takes place, venereal disease and pregnancy are more likely to occur when contraceptives are not used."[20] Therefore, appellants may be assumed to be aware of the severity of these consequences and to intend them as sanctions for sexual intercourse not approved by the State.

This Court may take judicial notice, as did the District Court, that minors who engage in sexual activity without contraceptives are subject to precisely the same risks and consequences as adults. They become pregnant, they have children or abortions, and they contract venereal disease. These consequences are simply more tragic in minors than in adults. Minors are less able physically, emotionally and economically, to cope with unwanted pregnancy or children. Their babies are less healthy than those of adults and are subject to greater emotional and economic deprivation than those of adults. The ravages of venereal disease will leave permanent effects. These are facts about which there is and can be no controversy. See opinion of three-judge court, at p. 16a and footnotes 12-16, pp. 32-33a and sources cited therein. See also Paul, *Legal Rights of Minors, supra,* at 358; Note, *Privacy Rights of Minors, supra,* at 1009-1010. Yet, appellants somehow seek to persuade the Court that real tragedies are less important than some ephemeral notion of impressing children with society's alleged view of sexual activity. In effect, appellants are voicing approval of the practical result of Education Law §6811(8), which is the punishment, by pregnancy or venereal disease, of minors who engage in intercourse. Such a result is untenable. As the Court said in *Eisenstadt* v. *Baird, supra*:

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[20] Opinion, at p. 16a.

> "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication * * * Aside from the scheme of values that assumption would attribute to the state, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proferred objective." 405 U.S. at 448.

See also *Associated Students for the Univ. of Cal. at Riverside, supra,* at 22 n. 3.

Finally, appellants' attempts to equate access to contraceptives with access to alcoholic beverages and obscene material are utterly unreasonable. Alcohol and obscene materials are neither constitutionally protected, nor are they beneficial to any person, minor or adult; rather, they are often harmful to both. Non-prescription contraceptives, on the other hand, are both constitutionally protected and of proven benefit to both sexually active minors and adults; no harm may be shown to either. As to the right to vote, while it is constitutionally protected, it is clear that valid reasons may be put forth to restrict the vote to people who are of an age to participate rationally in the political process, and there is no way of determining in each case what this age is. However, it is clear that there is an obvious way of determining at what time a person has the right of access to contraceptives. The right inheres at the onset of sexual activity.

The State's objectives in barring minors from access to contraceptives, even if they are legitimate (which appellees do not concede), are in no way advanced by Education Law §6811(8). Therefore, this statute was properly declared an unconstitutional violation of the right of privacy and the Equal Protection Clause.

POINT V

The statutory prohibition of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment as well as an unconstitutional burden upon the protected right to use and distribute such contraceptives.

Education Law §6811(8) places an absolute ban on display or advertisement of all contraceptives, including nonprescription contraceptives. New York has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut, supra,* 381 U.S. at 482, and to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453.

It is of course hornbook law that any statutory prior restraint of free speech and expression bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, 57 (1965); *Thomas* v. *Collins,* 323 U.S. 516, 529-530 (1945); *Near* v. *Minnesota,* 283 U.S. 697 (1931). The State "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *New York Times Co.* v. *United States, supra,* 403 U.S. at 714.

Appellants do not dispute that the statute here challenged is in fact a prior restraint, but seek instead to withdraw the speech thereby prohibited from the realm of protected

speech by calling it "commercial." However, it is clear that "[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U.S. 463, 474 (1966). See also *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 384 (1973). Mere utterance of the talismanic phrase "commercial speech," then, is not sufficient to support appellants' position.

This Court has most recently considered the protections to be afforded to speech in a commercial context in *Bigelow* v. *Commonwealth of Virginia,* —— U.S. ——, 95 S. Ct. 2222 (1975). In *Bigelow,* the Court indicated that in examining the extent to which commercial advertising may be regulated, First Amendment interests must be weighed with governmental interests. There, the advertisement in issue concerned abortion referral services. It was held that since " . . . the activity advertised pertained to constitutional interests . . . [and] . . . appellants' First Amendment interests coincided with the constitutional interests of the general public" the advertisement could not validly be proscribed, —— U.S. ——, 95 S. Ct. at 2233. Thus, while commercial advertising might be regulable if the underlying activity being publicized is illegal, as in *Pittsburgh Press,* or simply unprotected, as in *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. den. sub nom. Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), if the publicized activity is of constitutional import, its advertisement may not be prohibited. The "commercial speech" exception to the protection of the First Amendment, so off-handedly enunciated in *Valentine* v. *Chrestenson,* 316 U.S. 52 (1942),[21] is entirely inapplicable where the content of commercial speech is information regarding activity protected by the constitution.

[21] See *Cammarano* v. *United States,* 358 U.S. 498 (1959) (Douglas, J., concurring).

Lower courts have so interpreted this Court's rulings in the area of "commercial speech." In *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (N.D. Cal. 1975) (three-judge court), state laws prohibiting the advertising of prices for prescription drugs were stricken as violative of the First Amendment. The *Terry* court's well-reasoned opinion found a measure of constitutional protection for the advertising, and though it did not find the interest involved to be fundamental, it did find that its importance outweighed the State interest asserted against the advertising of prescription drug prices. The same rationale was applied, and the same result reached, in *Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy,* 373 F. Supp. 683 (E.D. Va. 1974) (three-judge court), *prob. juris. noted,* —— U.S. ——, 95 S. Ct. 1389 (1975).

Similar principles were held to govern dissemination of abortion and contraceptive information in *Associated Students for the U. of Cal. at Riverside* v. *Attorney General, supra,* and *Atlanta Cooperative News Project* v. *United States Postal Service,* 350 F. Supp. 234 (N.D. Ga. 1972) (three-judge court). In both cases regulations against mailing informational advertisements were struck down as violative of the First Amendment. See also the scholarly dissent of Judge J. Skelly Wright in *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 587 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co.* v. *Kleindeinst,* 405 U.S. 1000 (1972), which would extend First Amendment protection to *all* advertising.

The instant case is surely one which, under the relevant criteria, requires that the challenged restraint on advertising be declared unconstitutional. The advertising here concerns a fundamental constitutional right, as did that in *Bigelow*—the right of privacy in the use of one's own body. Appellees' concern is that all persons receive the knowledge that will enable them to exercise their constitutional right of privacy. Moreover, there is no state interest which is sufficiently compelling, or even legitimate, which is substantially related to the suppression of information regarding contraceptives.[22]

Appellants offer two purported state interests which are allegedly served by the ban on contraceptive advertising or display contained in Education Law §6811(8). One is that individuals not be exposed to purported embarrassment from such advertising and display. The other is that such advertising and display will lead to legitimization and increase of sexual activity among young people.

As to the first contention, it is sufficient to note that protected speech will not be rendered the less so because it is found offensive by some people. *Cohen* v. *California*, 403 U.S. 15 (1971); *Erznoznik* v. *City of Jacksonville*, —— U.S. ——, 95 S. Ct. 2268 (1975); *Salem Inn, Inc.* v. *Franx*, —— F.2d ——, No. 75-7101 (2d Cir. Aug. 28, 1975).[23] As to the State's second contention, of increased promis-

[22] Appellees respectfully disagree with the District Court's conclusion that a statute could be drawn which could regulate appellees' contraceptive advertisements, for the reasons set forth above; however, since the statute which is before the Court clearly cannot pass constitutional muster, this issue need not be reached.

[23] Appellees concur with the lower court that any obscene advertisement is regulable under the decisions of this Court; however, there is no issue of obscene advertising raised in this case.

cuity, appellants have presented no evidence whatsoever that any such result would occur, and it seems certain that if they could not show that actual access to contraceptives will increase sexual activity, it is dubious at best that they could show that information about contraceptives will lead to such an increase. Thus, neither "interest" may support this statute.

Finally, of course, the statute is overbroad, as was found by the district court. By its terms, it limits *any* publication of information regarding contraceptives. It is beyond dispute that some, even if not all, published discussion of contraceptives is protected. See *Bigelow, Associated Students,* and *Atlanta Cooperative, supra.* Thus, even if a statute could be written to regulate some contraceptive advertisements, this statute is clearly unconstitutional. See *Bigelow* v. *Virginia, supra; Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973); *Dombrowski* v. *Pfister,* 380 U.S. 479, 486 (1965).[24]

[24] Appellants, despite their efforts (p. 16), cannot distinguish *Bigelow, supra,* which involved an advertisement just as "commercial" as that here. Moreover, appellants cannot counter the lower court's finding of overbreadth with cases and principles concerning vagueness, as they have. Such cases are entirely inapposite.

CONCLUSION

Appellees respectfully submit that the District Court was manifestly correct in its holding that each provision of §6811(8) of the New York State Education Law is unconstitutional, as is clearly shown by the authorities herein cited. Accordingly, appellees respectfully urge that this Court grant the within motion, and affirm the decision of the court below without further argument.

Dated: New York, New York
October 21, 1975

Respectfully submitted,

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• Attorneys for appellees gratefully acknowledge the dedicated research and writing assistance of Ms. Karen Wagner, third-year student at New York University School of Law.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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CASES CITED

STATUTES CITED:

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BRIEF FOR APPELLANTS

Opinions Below

The opinion of the single district judge granting the motion to convene a three judge court, dated October 23, 1974, is reported at 383 F. Supp. 543 (45a).* The opin-

* Numbers in parentheses refer to Joint Appendix or Appendix to Jurisdictional Statement (J.S.).

ion of the three judge court, dated July 2, 1975, is reported at 398 F. Supp. 321 (J.S. 1a-35a). Probable jurisdiction noted. 44 U.S.L.W. 3697 (U.S. June 7, 1976).

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The judgment of the three judge court was entered on July 18, 1975 (72a). The notice of appeal was filed on July 24, 1975 (J.S. 36a-37a). Probable jurisdiction was noted on June 7, 1976.

Statute Involved

New York State Education Law § 6811(8) (McKinney 1972)

"It shall be a class A misdemeanor for:

• • •

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

Questions Presented

(1) Did the District Court correctly conclude that appellees Population Planning Associates, Inc. and Hagen had standing to challenge New York Education Law § 6811(8)?

(2) May a State statute provide that only licensed physicians may sell or distribute contraceptives to minors under

sixteen and only licensed pharmacists or physicians may sell or distribute such products to persons sixteen years or older?

(3) May a State statute proscribe the commercial advertisement and display of contraceptive products?

Statement of the Case

The Statute

Section 6811(8) of the New York Education Law was enacted in its present form in 1965.* Although in recent years various legislators have sought to alter its provisions in one way or another (New York Legislative Record and Index for 1974, A6843-B; New York Legislative Record and Index for 1973, S3067-A4368, S74-S3068-A4369, A1820, and S77-S3049-A4371; New York Legislative Record for 1972, S2181B), the New York Legislature has continued to reaffirm its belief that Section 6811(8) is a proper exercise of the State's police power and necessary and important legislation.

During debate on Assembly Bill 6843-B on April 18, 1974,** assemblymen expressed their concern that a repeal of the provisions prohibiting contraceptive displays in pharmacies would be detrimental to the youth of New York and increase, add to, or cause a promiscuous society (Assemblyman Green); expose children to contraceptive displays when they go into drugstores which frequently sell, among other things, candy (Assemblyman Mannix); lead to all kinds of advertising slogans (Assemblyman Gazzara); expose clerks in supermarkets, frequently young

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* This statute originally appeared as Section 1142 of the New York Penal Law. It was repealed from the Penal Law and enacted into the Education Law as § 6804-b. In 1971, it became § 6811(8) of the Education Law.

** A transcript of a debate in the New York Assembly on Assembly Bill 6843-B on April 18, 1974 and in the New York Senate on Senate Bill 2181-B on April 17, 1972 was submitted to the District Court.

girls, to undesirable comments and gestures (Assemblywoman Connelly); be permission for the young people of the State to go out and be permissive (Assemblyman Eposito) and interfere with the responsibility of parents for educating their children (Assemblyman Nicolosi).

Similar concerns were expressed during a Senate debate on April 17, 1972. Permitting the sale of contraceptives to children 10, 11, 12 or 13 years old will bring a great deal of immorality to our country (Senator Gioffre); will promote promiscuity, venereal disease, abortion and unwanted pregnancies (Senator Donovan) and give kids a license to be permissive (Senator Conklin).

In short, the legislators expressed concern that the repeal of § 6811(8) would lead to advertisements and displays of contraceptive products that would be offensive and embarrassing to many and would legitimize sexual activity by the young citizens of their State.*

The Appellees

Plaintiff Population Services International (PSI) alleged that it is a nonprofit corporation whose primary objectives are to discover and implement new methods of

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* Various states have statutes restricting the sale or distribution of contraceptive products generally or prophylactics specifically. Arkansas, Colorado, Idaho, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oregon, Tennessee (City of Knoxville), Texas, Utah, Wisconsin, Virginia, and the District of Columbia, limit their sale by a licensed pharmacist or druggist (physicians are usually exempted from the operation of these provisions). Additionally, at least twenty-one states restrict the advertisement and/or display of all or some contraceptive devices. Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kentucky, Massachusetts, Michigan, Montana, New Jersey, Oregon, Pennsylvania South Dakota, Utah, West Virginia, Wisconsin and Wyoming. For a more detailed survey and study, see Report of the National Center for Family Planning Services, *Family Planning, Contraception, and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction* (Dept. of HEW Pub. No. (HSA) 74-16001, 1974).

conveying birth control information and services to persons not now receiving them. It alleged that its activities include the test marketing of contraceptive products and advertisement of contraceptive products (4a-5a). Although PSI stated that it performs its educational, scientific and research activities in the United States, including the State of New York (5a), PSI did not allege that any official of the New York State Board of Pharmacy or the Attorney General's office had ever communicated with it, much less threatened it with any legal action.

Dr. Anna T. Rand, Dr. Edward Elkin and Dr. Charles Arnold alleged that they are physicians licensed to practice medicine in New York State who treat sexually active minors over and under the age of sixteen (5a-7a).

The Reverend James B. Hagen (Hagen) alleged that he is an ordained minister of the Protestant Episcopal Church and that he is the coordinator of the Sunset Action Group Against V.D. It sponsors a program in which male contraceptive devices are sold and distributed to local residents both over and under the age of sixteen at the church and at a local retail store which is not a licensed pharmacy (7a). He does not allege that any defendant has threatened him with legal action if he does not stop such sales.

John Doe alleged that he is forty-three years of age, that he is married and the father of four children, two of whom are under the age of sixteen. He alleged that he engages actively in sexual conduct and that he lives two miles from his licensed pharmacist (7a, 13a).

Population Planning Associates (PPA) alleged it is a North Carolina business corporation which maintains an office in New York City. It engages primarily in the retail sale of non-medical contraceptives through the United States mails. PPA advertises its products in national periodicals entering New York State and, from time to time, places advertisements for its products in local periodicals in New York State (7a-8a).

PPA alleged that in December 1971, over two and a half years before appellees instituted their suit, it received a letter from appellant Sica, Executive Secretary of the New York State Board of Pharmacy, advising PPA that an advertisement for the sale of condoms in an issue of the Utica College Tangerine was in violation of the Education Law (9a). Approximately one and a half years before this action was instituted, it received a letter written on behalf of appellant Sica advising PPA that the sale of contraceptives to minors under the age of sixteen was prohibited, that sales of contraceptives were limited by licensed pharmacists and that if PPA failed to comply with the statute, the matter would be referred to the Attorney General of the State of New York (9a).

PPA further alleged that on September 4, 1974, two inspectors from the State Board of Pharmacy threatened legal action if it did not discontinue an advertisement appearing in the September 1974 issue of Playgirl Magazine (14a). This advertisement solicited, *inter alia,* sales of prescription contraceptives, birth control pills, notwithstanding that PPA does not employ a pharmacist licensed in New York State (20a, 70a). Moreover, Victor J. D'Amico, an inspector with the Board of Pharmacy, in an affidavit submitted to the District Court, denied that legal action was threatened and stated that the visit was for informational gathering purposes only (69a-70a).

Although the complaint raised various constitutional arguments, appellees moved the District Court for summary judgment, attacking Section 6811(8) insofar as it applied to nonprescription contraceptives under 42 U.S.C. § 1983 on the grounds, *inter alia,* that it infringed the constitutional right of New York State residents, including minors under the age of sixteen, to have access to nonprescription contraceptives which is a fundamental constitutional right embraced within the right of privacy, and that the restriction on advertisement and display violated the First Amendment rights of New York State residents to receive information concerning such products as well as appellees' own right to dispense such information.

The Opinion of the District Court

The District Court examined the standing of the various appellees. The Court held that appellees PPA and Hagen had standing to challenge § 6818(8) and, accordingly, did not reach the issue of the standing of the remaining appellees.* (J.S. 9a-11a) The Court then turned to the merits of the action and considered plaintiffs' claim that the right of privacy encompasses the right to have access to nonprescription contraceptives and held that access to contraceptives is an aspect of the right of privacy encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment. The Court did not decide that this particular aspect of the right of privacy was "fundamental" but nonetheless scrutinized the three provisions of § 6811(8) to determine whether as drafted, they were, in fact, sufficiently related to a legitimate State interest to justify infringement of the right at stake, the standard adopted by the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974). (J.S. 13a)

Insofar as Section 6811(8) required that children under sixteen years of age obtain nonprescription contraceptives from licensed physicians, the District Court, while purporting to recognize that issues relating to sexual intercourse by minors below a certain age are matters with which the State may be legitimately concerned, held that the State had failed to prove that Section 6811(8) was substantially related to the State's goal of deterring sexual activities by minors under sixteen. (J.S. 18a)

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* Appellants disputed the standing of the remaining appellees to maintain this lawsuit on various grounds. Dr. Rand, Dr. Elkin and Dr. Arnold were exempted from the provisions of § 6811(8) by § 6807(1)(b) which permits a physician to supply his patients with such drugs as he deems proper in connection with his practice. John Doe was never identified, the truth of his allegations was unascertainable, and they were, in any event, chimerical. PSI failed to allege any threat of prosecution.

As for the prohibition on sale or distribution by anyone other than a licensed pharmacist, the Court concluded that even if the State had some legitimate interest in imposing some regulations on advertising and display of nonprescription contraceptives and in limiting, to some extent, the persons to whom such products may be sold, the interests advanced by the State were not sufficient to justify the limitation which it placed on the right of access to nonprescription contraceptives, i.e., by making them available only from a licensed pharmacist or a physician. (J.S. 19a-22a)

With regard to so much of Section 6811(8) as prohibited advertisement and display, the District Court concluded that the State's bar on advertisement and display was facially overbroad since it could reach "public interest" and mixed, as well as purely commercial advertising and display. (23a-26a)

Summary of the Argument

Appellees PPA and Hagen are without standing to attack the provisions of New York Education Law § 6811(8) since they have never been seriously threatened with prosecution for any violation of this statute notwithstanding that PPA and Hagen allege that they have continuously and repeatedly acted in derogation of its provisions.

The District Court improperly struck down New York Education Law § 6811(8) which consistently with applicable constitutional standards set forth that contraceptives may only be sold by licensed pharmacists and that children under sixteen years of age must obtain such products from physicians. Since this statute does not regulate use of contraceptives but simply access, the provisions of § 6811(8) do not affect a fundamental right and must be measured by the traditional equal protection test, is the statute reasonable and rationally related to a valid

State interest. The statute meets this test.

The provision that permits only pharmacists to sell contraceptive products is a reflection of the legislative concern that young people not sell contraceptive products, permits quality control of the product and allows the State Board of Pharmacy to police so much of § 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to children under sixteen. Permitting children under the age of sixteen to obtain contraceptives only from a licensed physician accommodates the needs of sexually active youngsters while expressing societal disapproval of sexual activity by pre-teenagers and those in their early teens. Even if the compelling State interest test is applied, these reasons for the statute render it immune from an equal protection attack.

As far as the proscription on advertisement and display, this provision is justified since it aids in preserving the values of the younger citizens of New York State and, additionally, avoids offending the sensibilities of the adult citizens of the State.

POINT I

Appellees PPA and Hagen have no standing to maintain this action since they do not allege in certain terms that appellants have threatened to prosecute them.

The District Court held that appellees PPA and Hagen had standing to challenge § 6811(8) of the Education Law in its entirety. However, these appellees have failed to meet the case or controversy requirement of Article III of the Constitution and are without standing to maintain this action. *Golden* v. *Zwickler,* 394 U.S. 103 (1969); *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Watson* v. *Buck,* 313 U.S. 387 (1941). We raise this issue of necessity because of the jurisdictional requirement of a justiciable controversy.

Among the factors which are necessary to show the existence of an actual controversy where a state criminal statute is involved is the "imminence and immediacy of proposed enforcement". *Watson* v. *Buck, supra* at 400.

The complaint fails to allege that there have been any prosecutions under § 6811 (8) of the New York Education Law and appellees' position at bar is almost identical to plaintiffs in *Poe* v. *Ullman, supra* at 508, where the court found a lack of a case or controversy:

> "The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."

Notwithstanding that appellee PPA has received two letters from defendant Sica as Executive Secretary of defendant Board of Pharmacy (9a), these letters hardly provide the requisite threat of prosecution found in *Doe* v. *Bolton,* 410 U.S. 179 (1973). The first letter, dated December 1, 1973, did not even mention prosecution, and although the second letter, dated February 23, 1973, did threaten possible legal action, appellee PPA was so little intimidated by the threat that it waited over a year before commencing this action on April 5, 1974. Moreover, although PPA alleged a visit to its premises on September 4, 1974 (10a), this visit was a response to an advertisement offering prescription contraceptives for sale in addition to nonprescription contraceptives, notwithstanding that PPA does not employ a pharmacist licensed in New York State. As attested to by Victor D'Amico, an inspector with the New York State Board of Pharmacy (69a), this visit was for informational gathering purposes only and appellee has failed to pinpoint any case in which actual legal action was instituted under similar circumstances.

The fact that the Board of Pharmacy has been aware of the activities of appellee PPA since at least December 1,

1973 and yet has never caused the initiation of legal action, coupled with the fact that plaintiffs failed to allege any prosecutions under the current statute, indicates that appellee PPA's fear of prosecution is indeed "chimerical".* Therefore, appellee PPA's claim of standing to attack § 6811 (8) is deficient under the *Poe* rule. *A fortiori* the claim of standing of appellee Hagen must also fail.

Even if appellee PPA had demonstrated a realistic fear of prosecution for advertisement and distribution of nonprescription contraceptives, in the context of this case, it is not a suitable representative to raise the alleged privacy rights of users of contraceptive products. The interest of PPA in this litigation is purely commercial, purely those of a seller, as opposed to the interests of Baird who was a genuine advocate of the rights of the unmarrieds in the State of Massachusetts.

POINT II

New York Education Law § 6811(8), in conjunction with New York Education Law § 6807(1)(b) reflects a proper legislative judgment that there be quality control of nonprescription contraceptives and that societal disapproval of sexual intercourse by children under sixteen be expressed.

The District Court, relying principally on *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), held that access to contraceptive products is an aspect of the right of privacy, *i.e.,* a right

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* Of course, assuming the validity of so much of § 6811(8) as permits only pharmacists to sell nonprescription contraceptives, the appelles, being nonpharmacists, are without standing to challenge the statutory scheme. As for challenging § 6811(8) on the ground that it interferes with the receipt of information regarding contraceptive products, Hagen does not allege that he is deterred in this regard. *Mercer* v. *Board of Education,* 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd,* 419 U.S. 1081 (1974).

encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment, without reaching the issue whether such right of access is a fundamental right which would require a "compelling State interest" to justify its abridgment (J.S. 13a).

The District Court concluded, citing the opinion of the United States Court of Appeals for the Second Circuit in *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974), that it must carefully scrutinize the provisions of Section 6811(8) to determine whether such provisions are, *in fact,* sufficiently related to a legitimate State interest to justify their infringement on the constitutional right, carved out by the District Court, of access to contraceptive products. (JS 13a)

In so doing, the District Court applied an improper standard to the provisions of Section 6811(8) which provide that only a licensed pharmacist may sell non-prescription contraceptive products and that children under sixteen must receive such products from a physician, effectively treating a right of access to contraceptives as a fundamental right, notwithstanding that the District Court did not, and indeed, could not, find such right to be fundamental.

New York in providing that only licensed pharmacists or physicians, where children under sixteen are concerned, may distribute contraceptives has merely regulated the sources from which individuals may obtain contraceptive products. New York does not prohibit the use or distribution of contraceptives to any of its citizens. Accordingly, the statutory scheme under attack here hardly reaches the level of "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child", *Eisenstadt* v. *Baird, supra* at 453, the issue before this Court in *Griswold* and later in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Planned Parenthood of*

Central Missouri v. *Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976).

The Court in *Griswold* makes this distinction clear. It was careful to note that the Connecticut law at issue in *Griswold* concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees since it forbade the use of contraceptives and did not simply regulate their manufacture or sale. *Griswold, supra* at 485.

The fact that the existence of one constitutional right does not create another constitutional right in a related area was made clear in *Rodriguez* v. *San Antonio Independent School District,* 411 U.S. 1 (1973), where the Court stated that substantive constitutional rights may not be judicially created, but must be explicitly or implicitly guaranteed by the Constitution. *Id.* at 33-34. The appellant in *Rodriguez* claimed that education is a fundamental constitutional right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. The court disagreed, holding that there was no explicit right to education, and that although education may be related to First Amendment rights and the right to vote, such relationship does not create a constitutionally protected status for education.

By applying the standard enunciated by the Second Circuit in *Boraas,* the District Court applied a stricter constitutional standard than warranted to state legislation which establishes a classification. Such standard has never been adopted by this Court and indeed was specifically rejected by this Court on appeal in *Boraas* and in *Rodriguez.* It is for the legislature, not the courts, to balance the advantages and disadvantages of the regulation. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952). Where a classification is involved, it is only necessary that it be

reasonable, and "that the State's system be shown to bear some rational relationship to legitimate state purposes." *Rodriguez* v. *San Antonio Independent School District, supra* at 40.

The New York Legislature has expressed a proper concern that young people not sell contraceptives and has provided that only licensed pharmacists may sell contraceptive products. This assures that only persons of mature years will be involved in the sale of such products. Moreover, limiting the sale by licensed pharmacists allows purchasers to inquire as to the relative qualities of the varying products and prevents anyone from tampering with them. *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156 (1973).

By permitting only licensed pharmacists to sell contraceptive products, the State Board of Pharmacy, which employs investigators to assure implementation of the Pharmacy Law (Education Law § 6804) is able to police so much of Section 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to minors under sixteen. If the sale of contraceptive devices were permitted in other establishments as well, the burden of policing these provisions would be prohibitive.

In considering this regulation, the Court should note that there is no claim that there are an insufficient number of pharmacies in New York State, and appellees' argument in this regard does not raise a serious issue. New York State has not limited the sale of contraceptives by a handful of establishments. As this Court observed in *Young* v. *American Mini Theatres*, 44 U.S.L.W. 4999, 5002 (U.S. June 24, 1976), "(V)iewed as an entity, the market for this commodity is essentially unrestrained."

Both prescription and nonprescription contraceptive products and devices are available to children under sixteen in New York State if dispensed directly by a

physician.* Neither the use nor distribution of contraceptives to these children is banned. Nor is parental consent required. *Compare Planned Parenthood of Central Missouri* v. *Danforth, supra.* New York has simply determined that the authorization for such distribution should come directly from a doctor, and does not want contraceptives being sold over the counter to very young children. Such a policy, it is believed, would sanction sexual activity by these youngsters, contrary to the public policy of New York State. Placing a physician between the child and the contraceptive product or device heightens the importance society attaches to a decision to partake in sexual activity at such a young age while, on the other hand, accommodating the needs of those sexually active children who disregard the socially prescribed standard. Such a statutory scheme does not violate the constitutional rights of a youngster under sixteen.

It is well established that a state can regulate morality. This Court only recently affirmed a decision of the United States District Court for the Eastern District of Virginia, *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975) (3 judge court), *aff'd*, 44 U.S.L.W. 3543 (U.S. March 30, 1976), *reh. denied*, 44 U.S.L.W. 3660 (U.S. May 18, 1976), which upheld the constitutionality of a sodomy statute as applied to consensual and private sexual activities between adult males. Many states have had and still have statutes and decisional law prohibiting fornication and adultery. See *State of New Jersey* v. *Lair*, 62 NJ 388, 301 A. 2d 748, 58 ALR 3d 627 (1973), and the accompanying ALR Annotation. The State has the right to enact laws to promote the public health, safety and morals of its citizens. *Griswold* v. *Connecti-*

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* The District Court erroneously states that New York Social Services Law § 350(1)(e) and § 365-a(3)(e) are exceptions to Education Law § 6811(8). Insofar as the Social Services Law provides for distribution of contraceptives to eligible persons of child-bearing age who are sexually active, if such person is less than sixteen years of age, such products must be made available through a physician.

cut, supra at 498 (GOLDBERG, J., concurring); *Poe* v. *Ullman, supra* at 546 (HARLAN, J., dissenting). In line with this, the Court, in *Roe* v. *Wade, supra* at 154, observed:

> ". . . [I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions".

In addition to regulating morality, it is also well established that minority as a classification has always had judicial sanction. *George* v. *United States,* 196 F. 2d 445 (9th Cir.), *cert. denied,* 344 U.S. 843 (1952). Because of its strong and abiding interest in youth, the State may regulate minor's access to material which a State clearly could not regulate as to adults. *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 690 (1965). This proposition was only recently affirmed by this Court.

> "The court indeed, however, has long recognized that the State has somewhat broader authority to regulate the activities of children than adults." *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 5204.

Although the age of maturity differs with different children, the legislature may make classifications as to age which will not be interfered with by the courts unless they are clearly unreasonable and arbitrary. *In re Morrissey,* 137 U.S. 157 (1890); *Jacobson* v. *Lenhart,* 30 Ill. 2d 255, 195 N.E. 2d 638 (1964); *Ex Parte Weber,* 149 Cal. 392, 86 P. 809 (1906). If different levels of maturity were to preclude age classification, all children would be allowed to vote and have access to alcoholic beverages and obscene material.

New York rationally has determined that unregulated exposure of minors to contraceptives, as argued for by

appellees, instead of decreasing out-of-wedlock births and venereal diseases, as appellees contend, would increase them since such complete exposure would sanction and as a result encourage sexual intercourse by young children.*

Such a conclusion has authoritative support. In discussing the availability of pornography, Dr. Gaylin of the Columbia University Psychoanalytic Clinic, made an observation equally applicable at bar:

> "(Psychiatrists) . . . made a distinction between the reading of pornography, as unlikely to be *per se* harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence in the developing ego." Gaylin, Book Review, 77 Yale L.J. 579, 594 (1968)

He goes on to state:

> "It is not for me, a psychiatrist, to lecture judges and legal scholars on the role of the law, but they must certainly be aware of the fact that when you make something legal you are doing more than making it allowable or exempt from prosecution. In our society, legal means legitimate, and legitimate means more. It means sanctioned and psychologically, at least, sanc-

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* New York accords special status to minors in other areas as well, *e.g.,* New York Domestic Relations Law § 15(2); New York Penal Law §§ 30.00; 130.30, 130.35, 130.40, 130.45, 130.50.

tioned implies approved, supported and even encouraged."* *Id.* at 593-594.

As the New York Legislature has noted, and as the reasoning of Dr. Gaylin confirms, deregulation of contraceptives for children under sixteen would be viewed as societal approval of their engaging in sexual intercourse. Moreover, teenagers often fail to use contraceptives even when available. Thus, the Legislature could rationally conclude that increased sexual activity with concomitant increased pregnancies and venereal diseases would result from abolition of all controls over distribution of contraceptives to children under sixteen. Appellees, in the District Court, failed to show that the availability of contraceptives would lead to their widespread use by children under sixteen.

Surveys have shown that although many teenagers do not use contraceptives, in most instances this is not due to the fact that they are unavailable. R. C. Sorensen, *Adolescent Sexuality in Contemporary America—Personal Values and Sexual Behavior Ages 13-19,* at 322-326 (1973); M. Schofield, *The Sexual Behavior of Young People* (1965). Psychologist Schofield concludes:

> "Our inquiries into the use of birth control methods among teenagers has shown that many boys are not using contraceptives and most girls who are having intercourse are at risk. This does not seem to be because teenagers have difficulty in obtaining contraceptives but because social disapproval means that many of their sexual adventures are unpremeditated and

* Dr. Gaylin gives as an example the liberalization of the narcotic laws in England. There was an increase in addiction among younger, healthier individuals. He says the same thing is happening with marijuana. "Whether this is desirable or not is another question not pertinent here. The point is that legalizing it would enhance its chances of becoming a social institution." *Id.* at 595.

> therefore adequate precautions have not been taken beforehand; many of the teenagers are aware of the risk, but in these extemporary situations sexual desire may override this awareness of the possible consequences." *Id.* at 251.

In discussing the failure of young people to use contraceptives notwithstanding their availability, another study observes:

> "[It] . . . may be that one of the greatest deterrents to use of contraceptives among teenagers is the episodic nature of sex among this group. Family planing assumes both a family context and the possibility of rational planning. When, however, sexual encounters are episodic and perhaps unanticipated, passion is apt to triumph over reason." Kantner and Zelnik, *Contraception and Pregnancy: Experience of Young Unmarried Women in the United States,* 5 Family Planning Perspectives, Winter 1973, at 22.

The sporadic use of contraceptives is confirmed by other statistical data. The overwhelming number of out-of-wedlock births occur in the 15-19 year age group, and four-fifths of that group have access to contraceptives in New York from pharmacists. *U.S. Bureau of the Census, Statistical Abstract of the United States: 1973,* at 54 (94th Ed. 1973). A study done by the Communicable Disease Center in Atlanta, Georgia, indicates that the availability of prophylactics bears no necessary relation to the incidence of venereal disease.*

Moreover, educating the youths as to the purposes of birth control is not the answer.

* See Exhibit B to appellants' memorandum in the District Court in opposition to appellees' motion for a three judge court.

> "Early 'knowledge' without judgment and intellectual capacity enormously complicates the problem. . . . The theory, of course, is that knowledge is always better than ignorance and that an early, natural and educational approach will lead to understanding . . . This theory overlooks the importance of timing in the process of education." *Hechinger and Hechinger, Teenager Tyranny,* 48 (1963).

In any event, contrary to the impression created by appellees in the District Court, the problem of venereal disease among youngsters is not as great as appellees would have the Courts believe. The Schofield study concludes

> "These results suggest that promiscuity, although it exists, is not a prominent feature of teenage sexual behavior. Consequently the risks of venereal disease are not very great." Schofield, *supra* at 253.

Kanter and Zelnik, *supra,* at 23, also point out that using contraception increases the risk that a young child's sexual activity will be discovered. The child's fear of discovery by his or her parents is another frequent disincentive to the use of contraceptives.

There are, of course, other considerations, equally pertinent here. Sanctioning sexual activity by making nonprescription contraceptives so widely available will counter any influence that fear of pregnancy has as a deterrent to sexual intercourse by young children and, on the other hand, will increase pressure on the immature mind to go along with the crowd. Finally, current technology offers no contraceptive device that fully meets the standards of acceptability, effectiveness and safety. A. Etzioni, *Genetic Fix* 162-164 (1973).

In short, permitting the widespread availability of contraceptives would lead to increased sexual intercourse by young children and it is the scheme argued for by appellees in the District Court that would increase the number of unwanted pregnancies and incidence of venereal disease.

Even if there were no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives, unless such link is explicitly disproved, it is not irrational for the legislature to restrict access to contraceptives in the hope of limiting that activity.

> "To be sure, there is no lack of 'studies' which purport to demonstrate that obscenity is or is not 'a basic factor in impairing the ethical and moral development. . . .' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.' We do not demand of legislatures 'scientifically certain criteria of legislation' ". *Ginsberg* v. *New York,* 390 U.S. 629, 641-643 (1968)

In sum, the New York statutory scheme which permits only pharmacists and physicians to distribute contraceptive products to persons sixteen years and older and only physicians to distribute them to children under sixteen is reasonable and rationally related to the legislative purpose. Moreover even if measured by the strict scrutiny test, these provisions pass constitutional muster. In view of the number of pharmacists in New York, any limitation on the access of adults to contraceptive products is *de minimus,* if it exists at all. As for children under sixteen, the morality and physical and emotional safety of these youngsters is a compelling state interest which warrants placing the physician between the child and the contraceptive device to deny state approval to sexual intercourse by children under sixteen while recognizing that when such intercourse occurs, a physician's counseling is appropriate. There can

be no doubt that even in the privacy area, a minor's rights are not unlimited. This was recognized only recently by this Court in *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 5204

> "We emphasize that our holding that § 3(4) is invalid does not suggest that every minor regardless of age or maturity, may give effective consent for the termination of her pregnancy."

POINT III

Section 6811(8), which bars commercial advertisement and display of contraceptive products, is a reasonable regulation that serves a legitimate public interest.

Appellants argued, and the District Court agreed, that advertisements and displays which are purely commercial may validly be regulated by the State. However, the District Court went on to invalidate the advertisement and display provisions of § 6811(8) on the grounds that the statute bars "public interest" and "mixed" as well as purely commercial advertising and display. Although the District Court observed that the PPA advertisements in the record before it represented purely commercial speech, the Court held that in the First Amendment area even litigants whose speech could properly be regulated by a narrowly drafted statute may challenge an overbroad statute on its face.

Noting that the New York Education Law § 6802(19) (McKinney 1972) defines "advertisements" as "all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of drugs, devices, or cosmetics", the District Court went on to find the advertisement and display provisions

of Section 6811(8) overbroad. The District Court did not detail the exact aspects of Section 6811(8) which it regarded as overbroad and appellants submit that Section 6811(8) limits only commercial advertisement of contraceptive products and is not constitutionally overbroad.

Section 6802(19) speaks of representations of a particular drug, device, or cosmetic that will lead directly or indirectly to the purchase of the article. This is a definition of a normal commercial advertisement and, indeed, so far as this record indicates, Section 6811(8) has never been applied to any material that was not of a purely commercial nature.

The applicable test is whether the statute conveys "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8 (1947). Even in criminal cases, where the overbreadth standard is the most stringent, the statute must only demonstrate an "ascertainable standard of guilt." *Winters* v. *People of State of New York,* 333 U.S. 507 (1948).

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . The Constitution does not require impossible standards." 332 U.S. at 7.

The word "advertisement" has a clearly commercial connotation, and it strains credulity to accept any argument that the use of such word in § 6811(8) suffers from overbreadth. Unlike the statute involved in *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975), Section 6811 (8) speaks only in terms of advertisements, does not refer to publications or lectures, and is more limited in its scope than Va. Code § 18.1-63 under attack in *Bigelow.* In short, it proscribes strictly advertisements and displays.

Although this Court has permitted individuals to challenge a state statute on the grounds that it is facially overbroad even though the individual's own conduct could be regulated by a more narrowly drawn statute, such attacks should not be sustained where there is no serious dispute as to the statute's meaning and where the statute is susceptible of a constitutional construction and, indeed, has always been applied consistent with such constitutional construction. Such is the case here. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973).

Moreover, the proscription on commercial advertisement of contraceptive products is a reasonable regulation since it reflects a legitimate legislative concern that individuals not be exposed to displays and advertisements of contraceptive products which may be offensive and embarrassing to many. It additionally indicates a concern that display and advertisement of contraceptive products will lead to legitimization of sexual activity on the part of young citizens of New York State and increased promiscuity. *Cf. Planned Parenthood Committee* v. *Maricopa County,* 92 Ariz. 231, 375 P. 2d 719 (Sup. Ct., 1962).

> "Advertising, like all public expression may be subject to reasonable regulation that serves a legitimate public interest." *Bigelow* v. *Virginia, supra* at 826.

This principle was only recently reaffirmed by the Court:

> "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 44 U.S.L.W. 4686, 4692 (U.S. May 24, 1976)

Moreover, as explained by the Court in *Young* v. *American Mini Theatres, supra* at 5005, n. 32:

> ". . . [T]he 'difference between commercial price and product advertising . . . and ideological communication' permits regulation of the former that the First Amendment would not tolerate with respect to the latter."

At the current time, the problems of overexposure of our youth to a mythology that represents that sexual satisfaction is all important is having dire consequences for the healthy development of these youngsters:

> "Within these urban conditions has grown up the tennage mythology, built up by the press, the advertizers, and the special teenage and pop music magazines. This has created an image of how the teenager is supposed to be behaved. . . . There is a danger that a teenager may feel he is exceptional because he has not had sexual intercourse." Schofield, *supra,* 256.

This is also documented and artfully explained by Hechinger and Hechinger, *supra.* Recognizing these problems and the tragic consequences for today's youth, the New York Legislature, as well as the legislatures of many other states,* has limited the commercial advertisement and display of contraceptive products.

In so doing, the legislature additionally has heeded the sensibilities of today's adults who might also be embarrassed by the advertisement and display of contraceptive products, not only directly, but by being put in the position of answering inquiries from their very young children who, in the parents' judgment, are not ready for such explanations.

This point is perhaps most strongly driven home by appellees themselves. The complaint in this action alleges that one of the appellees engages in sexual intercourse. But yet this appellee refuses to identify himself by name for fear of embarrassment. (7a)

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* See note, *supra,* p. 4.

In *Stanley* v. *Georgia*, 394 U.S. 557, 567 (1969), the Court recognized that a state may validly regulate the distribution of publications in order to prevent potential exposure to children or intrusion upon the sensibilities of persons who do not wish to view them. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), similar sentiments were expressed.

Information about contraception is available to all in New York who wish it. The State has merely determined that such information come from noncommercial sources so that it is free of potentially offensive advertising pitches and does not have the effect of encouraging sexual intercourse by New York children.

Viewed in this context, § 6811(8) is consistent with the First Amendment guarantee of the Constitution.

CONCLUSION

The order of the District Court granting appellees summary judgment should be reversed and judgment entered for the appellants.

Dated: New York, N.Y., August 2, 1976.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-443

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

—against—

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Hugh Carey, individually and as Governor of the State of New York, Louis J. Lefkowitz, individually and as Attorney General of the State of New York, Albert J. Sica, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and Board of Pharmacy of the State of New York,

Appellants,

—against—

Population Services International, Dr. Anna T. Rand, Dr. Edward Elkin, Dr. Charles Arnold, The Reverend James B. Hagen, John Doe and Population Planning Associates, Inc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Constitutional Provisions and Statutes Involved

In addition to the statutory provision set forth by the Appellants, several provisions of the Constitution of the United States are directly relevant to this action. Insofar as pertinent, they are here set forth:

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment XIV:

". . . [N]o State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Did the District Court correctly conclude:

   (a) That a case or controversy, ripe for adjudication, has been presented?

   (b) That the Appellees Population Planning Associates and Rev. James B. Hagen have standing to challenge New York State Education Law §6811(8)?

2. May a State, consistently with the Constitution,

   (a) Wholly proscribe the distribution of nonprescription contraceptives, except by physicians, to persons under the age of sixteen years?

   (b) Proscribe the distribution of nonprescription contraceptives to all persons, except through licensed pharmacists or physicians?

3. May a State, consistently with the Constitution, totally proscribe the dissemination of any form of advertisement or display concerning nonprescription contraceptives?

Statement of the Case

This is an appeal from a unanimous decision of a three-judge district court, of the Southern District of New York,[1] which held that §6811(8) of the New York Education Law is unconstitutional. That statute prohibits substantially all distribution of nonprescription contraceptives to persons under the age of sixteen years; prohibits the distribution of such contraceptives to persons over the age of sixteen, except by licensed pharmacists and physicians; and totally bans the dissemination of all advertising information or displays concerning such products. Violation of the law subjects the offender to criminal penalties.

The statute, passed in its present form in 1965, originally appeared as §1142 of the Penal Law, was then recodified as §6804-b of the Education Law, and in 1971 was again recodified into its present form. Although there have been no prosecutions reported under the present statute, a number were reported under its predecessors, the most recent occurring in 1965.

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[1] Composed of Friendly, Circuit Judge, and Pierce and Conner, District Judges.

The Appellees are individuals and organizations affected in significant ways by the statute's prohibitions. The three-judge court found that two of these Appellees, Population Planning Associates (hereinafter "PPA"), and the Rev. James B. Hagen (hereinatfer "Hagen"), had standing, and it therefore did not reach the question as to whether the other plaintiffs had standing.[2]

PPA is a North Carolina corporation conducting business in New York, which, *inter alia,* engages in the retail mail order sale of nonprescription contraceptive products. In response to advertisements placed by PPA in periodicals circulating within the State of New York (e.g., 20a),[3] PPA was contacted on three different occasions by representatives of the Appellant Board of Pharmacy of the State of New York. On December 1, 1971, a letter from the

[2] The other plaintiffs in the court below were Population Services International (PSI), Drs. Anna T. Rand, Edward Elkin, and Charles Arnold (the Doctors), and John Doe. PSI is a North Carolina nonprofit corporation with an office in the City, County and State of New York. Its objectives include the discovery and implementation of new methods of delivering contraceptive services and information to persons not receiving them, with the goal of reducing the miseries of unwanted pregnancies, disease and population growth. PSI wishes to be able to implement programs in New York for the distribution of nonmedical contraceptives through outlets other than licensed pharmacies. The Doctors are physicians active in family planning, pediatrics, obstetrics and gynecology. They treat sexually active adolescents both over and under the age of sixteen, and they advocate the distribution of nonprescription contraceptives through nonmedical and nonpharmacy outlets. John Doe is an adult male resident of New York State, whose access to contraceptive information and products, and whose freedom to distribute the same to his children under the age of sixteen, are prohibited by the statute here challenged.

[3] References to a page number followed by "a" indicate references to the Appendix filed in this Court.

References to "J.S." indicate references to the opinion of the court below, as reproduced in Appendix A to the Jurisdictional Statement filed in this Court by the Appellants.

Appellant Sica, Executive Secretary of the Board of Pharmacy, stated that PPA was in violation of Education Law §6811(8), for having placed an advertisement in a college newspaper, allegedly soliciting "the sale of condoms to students." The letter demanded "future compliance with the law" (18a, J.S. 5a). A second letter, dated February 23, 1973, asserted that PPA's efforts to sell male nonprescription contraceptives through magazine advertisements were unlawful, and warned that, "In the event you fail to comply the matter will be referred to our Attorney General for legal action" (19a, J.S. 5a). Lastly, on September 4, 1974, after the commencement of this action, PPA's New York office was visited by inspectors from the Board of Pharmacy. PPA's president was told to stop selling contraceptives because such sale was in violation of the law. The inspectors further warned PPA that its violations of the law would be reported to the Board of Pharmacy, and such a report was indeed made, and a copy left with PPA (21a-23a, J.S. 5a). While Appellants now maintain that the latter inspection was "for informational gathering purposes only" (Appellants' Brief, p. 6), the court below specifically found that the inspectors threatened to report PPA to the Board of Pharmacy (J.S. 5a), a threat which was tantamount to a threat of prosecution.

Hagen, too, has regularly engaged in conduct forbidden by the statute. As an ordained Episcopal minister and rector of a church in a poor neighborhood in Brooklyn, New York, Hagen has acted as coordinator of the Sunset Action Group Against V.D., a group which sells and distributes male nonprescription contraceptive products to persons both over and under the age of sixteen, both at the church and through a retail outlet which is not a licensed pharmacy (J.S. 4a, 7a-8a).

The court below found that §6811(8) unquestionably interfered with access by New York State residents to nonprescription contraceptives, and to information about them. The court further held such access to be an aspect of the constitutionally protected right to privacy of New York's citizens, which PPA and Hagen had standing to represent. The court did not, however, find it necessary to determine whether the rights so infringed were "fundamental" rights, so that the infringement might be upheld only under a showing of compelling State interest. Rather, the District Court, as to each of the statute's prohibitions, reviewed the asserted interest of the State in maintaining those prohibitions, and was able to find no rational connection at all with any interest which the State might permissibly seek to further by the statute.

Accordingly, the court below granted judgment to the Appellees, declaring §6811(8) of the New York State Education Law to be violative of the Constitution and granting injunctive relief against enforcement of the statute (J.S. 27a).

Summary of Argument

1. The Appellees present a case or controversy. The criminal statute here challenged directly operates against PPA and Hagen, and PPA has several times been threatened with prosecution. Moreover, there have been a number of prosecutions under the statute, and the State Legislature, by refusing to amend or repeal the statute, has evidenced the State's continuing interest in maintaining its prohibitions.

PPA and Hagen have standing. Their own First Amendment rights have been abridged by this statute. Moreover, the rights of third parties which PPA and Hagen raise here as advocates, may only be vindicated in this manner, because the challenged statute does not forbid use of contraceptives or receipt of information about them, but merely the distribution of either. Further, because of the intimate nature of the rights involved, contraceptive users are chilled and embarrassed to step forward in their own behalf.

2. The constitutional right of privacy includes the fundamental right of access to contraceptives. The right of privacy protects the individual from improper governmental intrusion into fundamentally personal decisions relating to the right to engage in sexual intercourse, and the right to determine whether or not to procreate. This right has been held by this Court to include the right to use contraceptives, a right which would be utterly meaningless unless it carried with it the right of access to contraceptives. The right of access is no less fundamental than the right to use, and only a compelling State interest may justify its infringement. No portion of this statute is rationally related to any legitimate State concern—much less supported by a compelling State interest.

3. The statutory bar on distribution of nonprescription contraceptives save by licensed pharmacists or physicians unconstitutionally burdens the right to obtain such contraceptives. The State's purported "administrative convenience" in enforcing the remainder of the statute (also constitutionally infirm) is not a constitutionally sufficient reason for the abridgement of fundamental rights. The

alleged knowledgeability and expertise of pharmacists in this area, even if it exists, is irrelevant and unnecessary. No health considerations are involved. The desire to avoid having young people sell contraceptives is not a legitimate State interest and even if it were, far less restrictive means of reaching this result are readily conceivable.

4. The statute violates the constitutional rights of minors by unduly infringing their access to contraceptives. Minors may not be denied fundamental constitutional rights solely on the basis of age. Minors who engage in sexual intercourse, no less than adults, are desperately in need of the protection afforded by access to contraceptives, for the same miseries of unwanted pregnancy, childbirth, abortion, and venereal disease befall minors as easily as adults, with consequences which are, if anything, still more terrible. The deterrence of sexual activity among the young, even if the State may indirectly legislate in this fashion, manifestly has no proven or provable relation to the statute. There is no rational reason—as the State has conceded—to believe that hindering minors in their right of access to contraceptives deters them at all from sexual intercourse. Where a statute burdens the exercise of a constitutional right, and not only does not further the purported State interest or help any of those who are subjected to it, but in fact visits terrible harm upon them, it cannot stand.

5. The total prohibition of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment, as well as an unconstitutional burden upon the right to use and distribute such contraceptives. The State's claim that the

speech involved is "commercial" and thus unprotected, if it ever had any weight, is plainly now foreclosed by this Court's most recent decisions. Protected speech is no less protected because it may possibly be offensive to some people. A purported interest in regulating morality cannot justify this violation of this First Amendment. In any event, the State cannot demonstrate that limiting access to information about contraceptives will deter illicit sex.

Finally, the statute is overbroad, for it limits any publication whatsoever of information regarding contraceptives.

POINT I

The Court below was correct in finding that Appellees have standing, and that a case or controversy is presented.

The Appellants urge this Court to hold that the court below erred in its holding that the Appellees Population Planning Associates and Hagen have presented a justiciable case or controversy, and that they have standing to assert the claims presented. It is respectfully submitted that the decision of the District Court was entirely correct in this regard, and should be affirmed; indeed, this Court's own rulings subsequent to the decision of the District Court only lend further support to the conclusions of the latter.

The Appellees, as noted, seek to assert *both* their own First Amendment rights, of the advocacy, advertising, display and distribution of nonprescription contraceptives, all of which are forbidden by the criminal statute here under attack, and the First Amendment and privacy rights of others who are not parties to this action—residents of

New York State who are intolerably burdened in their access to contraceptives and contraceptive information.

A. *A Case or Controversy Is Presented.*

The primary thrust of the Appellants' assertions is that the Appellees have presented no case or controversy, a contention which on its face is wholly without merit. Thus, Appellants contend (Appellants' Brief, p. 10), perhaps somewhat disingenuously, that there have been no prosecutions under New York Education Law §6811(8), and that this case is therefore governed by this Court's holding in *Poe* v. *Ullman,* 367 U.S. 497 (1961). The latter case, however, concerned a Connecticut statute which plainly was wholly moribund, for the State of Connecticut had clearly evidenced a complete lack of intention to enforce the law, and the plaintiffs were able to demonstrate only a single, abortive attempt to enforce the statute in the more than three-quarters of a century since its enactment. Here, by contrast, as the Appellants wholly omit to inform this Court, there have indeed been a number of prosecutions under the almost identical predecessor to the present statute, former §1142 of the Penal Law; these have occurred as recently as 1965.[4] If a State could escape judicial review of the constitutionality of its statutes by no more than the simple device of recodification, and an assertion that there had been no prosecutions under the newly codified statutes, the result would be no less than farcical.

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[4] *People* v. *Baird,* 47 Misc.2d 478, 262 N.Y.S.2d 947 (Sup. Ct. Nassau Co. 1965); *People* v. *Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918), *app. dism.* 251 U.S. 537 (1919); *People* v. *Byrne,* 99 Misc. 1, 163 N.Y.S. 682 (Sup. Ct. Kings Co. 1917). See also Op. Atty. Gen., 45 St. Dept. 308 (1932) (sale of prophylactics in coin machine illegal under § 1142).

The Appellants' arguments, moreover, are blatantly inconsistent. They strenuously seek to convince this Court, in Point I of their Brief (pp. 9-11), that the statute, if not moribund, is on its deathbed, and that the likelihood of prosecution is nil. Elsewhere, however, they argue no less strenuously in support of what they maintain are the State's numerous and compelling interests in maintaining and enforcing the very same statute, and that the statute has been repeatedly reaffirmed by the State Legislature, despite numerous attempts at amendment or repeal.

Should any doubt remain as to the State's continuing interest in the enforcement of this legislation, such doubts are wholly removed by the repeated communications which PPA has received from the Appellant Sica, Executive Secretary of the Appellant State Board of Pharmacy, and from other representatives of the Board. In both the letters received by PPA, and in the so-called "information gathering" visit by an inspector of the Board of Pharmacy, PPA was directly put on notice that the Appellants believed PPA to be acting in violation of State law, and one of the letters directly threatened "legal action" (18a, 19a, 21a). Such continuing threats make it plain that " . . . the challenged governmental activity in the present case . . . by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of" the Appellees. *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, at 122 (1974). Moreover, as this Court has noted,

> "[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless [federal] plaintiff between the Scylla of

intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel* v. *Thompson,* 415 U.S. 452, at 462 (1974).

The Appellees here have been placed by the State of New York in exactly the center of that dire strait.

In such circumstances, the Appellants' claim that there is no justiciable controversy is wholly without merit, and is wholly at odds with numerous holdings of this Court, reaffirmed as recently as last Term, which recognize that actual prosecution under a challenged criminal statute is not essential to the presentation of a case or controversy. Thus, in *Doe* v. *Bolton,* 410 U.S. 179, at 188 (1973), this Court found that the doctor plaintiffs

"... also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes operate directly ... The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

Indeed, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), this Court found no barrier to standing despite a total absence of prosecutions for the nearly forty years that the challenged statute had existed.

As the lower courts have recognized, "Under *Bolton* ... all that is required for justiciability and standing is that the criminal statute directly operate against the party seeking relief." *Associated Students, U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, at 19 (C.D. Cal. 1973). See also *Friendship Medical Center, Ltd.* v. *Chicago Bd. of Health,* 505 F.2d 1141 (7th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975), where the court held the appellant physicians to have standing even though they were *in compliance* with the challenged statute, because of the statute's continuing effect in enforcing compliance through a fear of prosecution.

Indeed, just this past Term, the Court found standing for physicians performing abortions, to challenge a Missouri statute which made the performance of certain abortions a misdemeanor; without even pausing to consider the likelihood of prosecution, the Court held that the physician was the one against whom the act directly operated, and that therefore the physician asserted a sufficiently direct threat of personal detriment to present a justiciable controversy. *Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976). See also *Singleton* v. *Wulff,* —— U.S. ——, 96 S. Ct. 2868 (1976), in which, although the Court divided over the question of whether the physician plaintiffs were the proper proponents of the particular rights which they asserted, there was unanimous agreement with Part IIA of Mr. Justice Blackmun's opinion, that they alleged sufficient injury in fact to constitute a case or controversy, a conclusion which, the Court held, "needs little comment for there is no doubt now that the appellee-physicians suffer concrete injury.... If the physicians prevail ..., they will

benefit. . . . The relationship between the parties is classically adverse. . . ." —— U.S. at ——, 96 S. Ct. at 2873.

Similarly, in the present case, the Appellees PPA and Hagen "suffer concrete injury" at the hands of this statute, and if they prevail, they will directly benefit, both financially, and in being freed of the fear of criminal prosecution for partaking in constitutionally protected activites. As in *Singleton,* the relationship between Appellants and Appellees here is "classically adverse," and a case or controversy, ripe for adjudication, has unquestionably been presented.

The Appellants' contrary assertion is clearly erroneous, and their reliance on such cases as *Golden* v. *Zwickler,* 394 U.S. 103 (1969), and *Watson* v. *Buck,* 313 U.S. 387 (1941), is plainly misplaced. In *Golden,* the obstacle to adjudication was essentially mootness; the particular election in which the plaintiff desired to conduct what he contended was constitutionally protected leafletting activity had passed, and the plaintiff made no clear showing as to whether, when, or how he might wish to engage in such activity in the future. Here, by contrast, the Appellees PPA and Hagen have engaged continuously in the prohibited conduct, and have every intention of continuing to do so. The citation of *Watson* v. *Buck* is still further misplaced, even aside from its great age, for the case involved a broad challenge to a newly-enacted, lengthy and complex statute, never interpreted by the State's own courts, and as to which there was no real showing of any likelihood of enforcement at all.

This case, however, presents no such infirmity. The Appellees have engaged and continue to engage in a course

of conduct for which they face prosecution by the State, and they have been threatened with such prosecution, under a statute whose meaning is all too clear. The relationship between the parties is "classically adverse," and there is no obstacle to adjudication of this case.

B. *The Court Below Correctly Held That Appellees PPA and Hagen Have Standing.*

Just as there can be no doubt that a sufficiently justiciable case or controversy has here been presented, there can equally be no doubt that the Appellees PPA and Hagen are proper parties to assert the claims which are sought to be vindicated by this action—both the rights of these Appellees themselves, and the rights of those third parties, residents of New York State, who suffer intolerably severe adverse consequences from the continued enforcement of the challenged statute. Indeed, Appellants do not appear very seriously to dispute that PPA and Hagen are proper parties to assert these claims, nor could they reasonably challenge such a contention, for the District Court's holding on this issue was eminently correct.[5]

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[5] The court below, as noted, did not pass on the standing of the Appellees PSI, Doctors and John Doe. It is evident, however, that they too have standing. PSI seeks to distribute contraceptives and information about such products and is barred from doing so by Education Law § 6811(8), which "directly operates" against it. The Doctors are similarly hampered in distributing contraceptives and information, and in their advocacy of the availability of contraceptives in nonmedical and nonpharmaceutical places. Thus, both as "advocates" and as parties against whom the statute's criminal prohibitions directly operate, all of these Appellees have standing. John Doe is himself hindered in his access to contraceptives and information, and is proscribed from giving the same to his minor children; these direct prohibitions on his own constitutionally protected activities clearly give standing to Doe.

First, of course, it is plain that in several respects, the statute operates directly to abridge the First Amendment rights of these Appellees themselves, to advertise and otherwise disseminate information concerning contraceptives. As to these rights, there can hardly be any doubt of the standing of PPA and Hagen to assert their own claims. *See,* e.g., *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975); *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *New York Times Co.* v. *United States,* 403 U.S. 713, at 749 (1971) (Burger, C.J., dissenting); *Griswold* v. *Connecticut,* 381 U.S. 479, at 482-3 (1965); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

Second, as has long been established under this Court's decisions, it is entirely proper, in appropriate circumstances, for plaintiffs to represent the constitutional rights of third parties who are not themselves before the Court. *See,* e.g., *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); *Barrows* v. *Jackson,* 346 U.S. 249 (1953). The standards which this Court has developed for such advocacy of third-party rights, particularly in cases falling under the general rubric of "privacy" litigation, are plainly satisfied by PPA and Hagen.

Thus, in *Griswold* v. *Connecticut, supra,* where the petitioners were the Executive Director of Planned Parenthood of Connecticut and a physician, both of whom had been convicted of dispensing contraceptives to married persons in violation of Connecticut statute, this Court permitted the petitioners to assert the constitutional rights of the recipients of the contraceptives, finding it persuasive that "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind

of confidential relationship to them." 381 U.S. at 481. Similarly, in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), Baird, a distributor who was not a physician or otherwise part of any traditional confidential relationship with the recipients of contraceptives, was permitted to assert the rights of the recipients, in part because of the Court's finding that

> "[T]he relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." 405 U.S. at 445.

As the court below found, "[L]ike Baird, plaintiffs PPA and Hagen are advocates of the privacy rights of those they seek to represent. They advocate the increased availability of nonprescription contraceptives to those whose ability to obtain them is impaired by §6811(8)." (J.S. 7a).

The contrary assertion of the Appellants (Appellants' Brief, p. 11) is wholly baseless, in contending that PPA is not a proper plaintiff because "The interest of PPA in this litigation is purely commercial, purely those of a seller as opposed to the interests of Baird who was a genuine advocate of the rights of the unmarrieds in the State of Massachusetts." Appellants simply omit any mention whatever of the District Court's aforementioned finding, which is fully supported by the record. Moreover, even if there were some support for the Appellants' assertion that PPA's interests are "purely commercial," the relevance of any such argument is wholly destroyed by this Court's decisions in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* —— U.S. ——,

96 S. Ct. 1817 (1976) and *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975).

In addition to the advocacy role of PPA and Hagen, this case presents another element which was present in *Eisenstadt*, and which this Court found to be an even more compelling reason to recognize Baird's standing to represent the rights of others:

> "[M]ore important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests . . . [T]he case for according standing to assert third-party rights is stronger in this regard here than in Griswold because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights. . . . The Massachusetts statute, unlike the Connecticut law considered in Griswold, prohibits, not use, but distribution." 405 U..S. at 445-6 (footnotes omitted).

In the present case, likewise, New York's statute does not place any direct proscription on the use of contraceptives, but only on their distribution. Accordingly, users or potential users of contraceptives may well be denied any forum to assert their own rights, and standing to represent them should therefore be granted, as in *Eisenstadt*, to those against whom the statute does operate.

Again, this Court's most recent decisions concerning the assertion of the rights of third parties, particularly in

the area of privacy, lend further support to the contentions of the Appellees. Thus, in *Planned Parenthood of Central Missouri* v. *Danforth*, —— U.S. ——, 96 S. Ct. 2831 (1976), as in *Doe* v. *Bolton*, 410 U.S. 179 (1973), the fact that the challenged criminal statutes operated directly against the physician plaintiffs gave assurance that those plaintiffs would have the requisite interest in asserting the rights of third parties, and they were permitted to do so.

Similarly, in *Singleton* v. *Wulff*, —— U.S. ——, 96 S. Ct. 2868 (1976), although the Court divided over whether the plaintiffs there could properly assert third party interests, in challenging not a criminal statute, but a provision which rendered the performance of most abortions ineligible for Medicaid benefits, the language of each of the three opinions indicates support for the standing of PPA and Hagen in this case. Thus, Mr. Justice Blackmun's prevailing opinion suggested that standing should be found where the enjoyment of the right asserted is inextricably bound up with the activity which the litigant wishes to pursue, and is thus necessarily affected by the outcome of the litigation, and there is serious doubt whether the third parties will be able themselves to assert the rights at issue. —— U.S. ——, 96 S. Ct. at 2874. Plainly, in this case, the right of access to contraceptives, and to information about them, is inextricably bound up with the ability of the Appellees and others to distribute such contraceptives and information. Just as plainly, serious impediments exist to the assertion of their own rights by the third parties who will be affected, for, as noted, §6811(8) does not operate directly against those persons at all; moreover, many of the very persons to whom PPA has sought to appeal in its advertising, and whom it has sought to assist, are those desiring the pri-

vacy and confidentiality of purchasing contraceptives by mail, and therefore less likely to be willing or able to bring suit themselves (see 20a, 37a, 39a, 40a).

Appellees PPA and Hagen also satisfy the test advanced by Mr. Justice Stevens in his concurring opinion, —— U.S. at ——, 96 S.Ct. at 2877, that where the plaintiffs themselves have a financial stake in the outcome of the litigation, and they assert that the statute impairs their own constitutional rights, they should also be permitted to present arguments based on the statute's effect on the constitutional rights of others.

Finally, the concurring and dissenting opinion of Mr. Justice Powell, joined by the Chief Justice and Justices Stewart and Rehnquist, sets forth a test also satisfied by the Appellees here. Thus, Mr. Justice Powell based his disagreement with the Court's finding of standing on the fact that the State of Missouri had not *forbidden* the performance of abortions, but had merely refused to pay for them. Had they been forbidden outright, the opinion made clear, the dissenters would agree that standing should be found:

> "The principle [which *Griswold, Doe* v. *Bolton,* and *Danforth* v. *Planned Parenthood of Missouri*] support turns not upon the confidential nature of a physician-patient relationship, but upon the nature of the State's impact upon that relationship. In each instance the State directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures. In the circumstances of direct interference, I agree that one party to the relationship should be permitted to assert the constitutional rights of the

> other, for a judicial rule of self-restraint should not preclude an attack on a State's proscription of constitutionally protected activity." —— U.S. at ——, ——, 96 S. Ct. at 2877, 2880-81.

The latter opinion thus describes the present situation exactly; the State of New York has directly prohibited certain activity, by defining it as criminal activity. No judicial rule of self-restraint should be imposed, which would stand in the way of the present attack on the State's proscription of activity which is entitled to the full protection of the Constitution.

Accordingly, the holding of the District Court should be affirmed in finding standing for the Appellees PPA and Hagen.

POINT II

The constitutional guarantee of personal privacy includes the fundamental right to obtain and have access to nonprescription contraceptives.

It is now clear beyond peradventure that under the Constitution there exists a zone of personal privacy protecting the right of any citizen to make fundamental personal decisions concerning procreation without improper governmental intrusion. This Court has made it manifestly plain that there is a constitutional privacy right which encompasses activities relating, *inter alia,* to the use of contraceptives and the right to obtain and to have access to such products. See *Roe* v. *Wade,* 410 U.S. 113, at 152-153 (1973).

Indeed, the modern judicial development of the concept of privacy as a right guaranteed by the Constitution began with this Court's decision in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), which concerned a state statute forbidding the use of contraceptives by all persons, and which overturned the statute as violative of the constitutional right to marital privacy. *Griswold* held that an implicit privacy right emanated from the First, Third, Fourth, Fifth and Ninth Amendments. The privacy right thus found was held to protect associational concepts, the sanctity of the home, and the marital relationship. This right was sufficient to invalidate Connecticut's prohibition on the use of contraceptives by married couples.[6]

The decade following *Griswold* has been one in which this Court and the lower federal courts have steadily widened their recognition of the constitutional privacy right, to allow the individual autonomy in the most intimate phases of personal life, having to do with sexual intercourse and its consequences, an area which plainly includes the right to distribute and to have access to contraceptives.

In *Eisenstadt* v. *Baird, supra,* the Court examined and found unconstitutional a Massachusetts statute which "merely" regulated access to contraceptives but which did not impose any penalties for contraceptive use. The statute at issue prohibited the distribution of all contraceptives to unmarried persons, and required even in the case of

[6] The Appellants mistakenly assert that the *Griswold* opinion holds that a state statute which "simply" regulates the manufacture or sale of contraceptives will withstand constitutional scrutiny (Appellants' Brief, p. 13). On the contrary, as Mr. Justice White stated in his concurring opinion in *Eisenstadt* v. *Baird,* 405 U.S. 438, at 461 (1972), the Court in *Griswold* "expressly left open any question concerning the permissible scope" of legislation regulating the manufacture or sale of contraceptives.

married persons that all contraceptives be obtained from a physician or from a licensed pharmacy with a doctor's prescription. A plurality of the Court held that the distinction between married and unmarried persons, where contraceptives were concerned, violated the equal protection clause of the Fourteenth Amendment.

Mr. Justice Brennan's plurality opinion made it apparent that the privacy right enunciated in *Griswold* would not be limited to the marital relationship, and would extend to all persons on an individual basis, stating:

> "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*" 405 U.S. at 453. (Emphasis supplied.)

Since the Court in *Eisenstadt* found the Massachusetts statute to be irrational, on traditional equal protection grounds, it was not necessary to decide whether a statute impinging upon the right of access to contraceptives violated a fundamental freedom included within the right of privacy, which would subject it to the stricter scrutiny of the "compelling state interest" test. 405 U.S. at 447, fn. 7.

But this question, left unanswered in *Eisenstadt,* was answered affirmatively and clearly in *Roe* v. *Wade, supra,* where the Court held that a woman's right to terminate her pregnancy was a "fundamental" constitutional right, and therefore subject to regulation only on the basis of a "compelling state interest"—an interest which was found not to exist during the first trimester of pregnancy. At the same time, the Court made it clear that activities relating to contraception (activities which of necessity must include access to and distribution of contraceptives) were fundamental rights, requiring that a compelling state interest be shown before they could be burdened by the State.

> "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942), *contraception,* Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); id. at 460, 463-465 (White, J., concurring in result), family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska [262 U.S. 390 (1923)]." 410 U.S. at 152-153. (Emphasis supplied.)

See also *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Paris Adult Theater I* v. *Slaton,* 413 U.S. 49, at 65 (1973); and Note, *On Privacy, Constitutional Protection for Personal Liberty,* 48 N.Y.U. L. Rev. 670, 706, n. 221 (1973) [hereinafter

Note, *On Privacy*], wherein it is suggested that the Court's subsequent references to the *Eisenstadt* decision indicate a recognition that that case extended the coverage of the privacy right to access to contraceptives.[7]

In light of this Court's decisions in *Griswold, Eisenstadt* and *Roe* v. *Wade,* those lower federal courts faced with the question of whether access to contraceptives is a fundamental right protected by constitutional privacy have all concluded that it is.

For example, the Court of Appeals for the Second Circuit, in *Roe* v. *Ingraham,* 480 F.2d 102 (2d Cir. 1973), strongly stated its view that access to and distribution of contraceptives was constitutionally protected. The Court held as follows:

> "That decision [Griswold v. Connecticut] along with Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed.2d 349 (1972), can be viewed as forecasting recognition of a constitutional right of men and women to decide, free of governmental interference, whether to minimize the risks of conception from sexual intercourse, although *Griswold* focused on the provision of the Connecticut statute proscribing the *use* of contraceptives and the attendant horrors of enforcement in the case of married persons, 381 U.S. at 485-486, 85 S. Ct. 1678, and *Eisenstadt* was rested on the equal protection clause." 480 F.2d at 107. (Emphasis in original.)

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[7] See also *Runyon* v. *McCrary,* — U.S. —, 96 S. Ct. 2586, at 2598 (1976), in which Mr. Justice Stewart, for the Court, after referring to *Griswold* and *Roe,* stated that the "government is largely or even entirely precluded from regulating the childbearing decision. . . ".

In *T—H—* v. *Jones,* —— F. Supp. ——, C-74-276 (D. Utah July 23, 1975), *aff'd* on other grounds, —— U.S. ——, 96 S. Ct. 2195 (1976), a three-judge court invalidated a state regulation which barred distribution of contraceptives to minors without parental consent, and after reviewing *Griswold, Eisenstadt,* and *Roe,* held that the right of privacy included the right to have access to contraceptives, stating:

> "If, as *Roe* teaches, the fourteenth amendment protects a woman's right to decide whether she will terminate her pregnancy, it must also, we believe, protect her right to take measures to guard against pregnancy. In either instance the woman's interest is the same, that is, to make fundamental personal decisions about sexual conduct and procreation free from state interference. We are convinced, therefore, that the right to privacy underlying the Supreme Court's decision in *Roe* v. *Wade* prevents the state from intruding, without justification, into the decision of adults whether to obtain and use contraceptive devices and whether to seek out counseling in family planning matters." Slip Opinion, at p. 11.

See also *Baird* v. *Lynch,* 390 F. Supp. 740, at 749-50 (W.D. Wis. 1974) (three-judge court); *Associated Students, U. of Cal. at Riverside* v. *Attorney General,* 368 F. Supp. 11, at 22 (C.D. Cal. 1973) (three-judge court).

In determining, in *Roe* v. *Wade, supra,* that the abortion decision was fundamental, this Court looked to the harm that would befall the women affected if the State were permitted to preclude the woman's free choice not to bear a child.

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." 410 U.S. at 153.

Similar adverse effects, and other dire consequences as well, are likewise visited upon substantial numbers of adult and minor men and women in New York by the statute here at issue, which in effect prescribes all of the potential risks of out-of-wedlock birth, unwanted pregnancy and venereal disease, and denies the freedom of personal privacy.[8]

Obviously, the right of access to contraceptives is essential to the exercise of the right to use contraceptives, and therefore must similarly be found fundamental and an aspect of the privacy right.[9] Individuals do not have an effective right to use contraceptives unless they have access

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[8] That such unfortunate consequences result directly from the continued enforcement of this statute is amply documented; see Point IV, *infra,* and particularly text following fn. 17.

[9] See Note, *On Privacy, supra,* at 706-707; Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy;* 88 HARV. L. REV. 1001, at 1006 (1975).

to them and to information concerning them. Since recognition of a hollow, meaningless right can hardly have been the Court's intention, it is clear that the Court meant, when it recognized the right of contraceptive use, to recognize the full spectrum of rights which would make the principal right meaningful. This premise was made clear in *Griswold* when it was declared that specific constitutional rights are insured only by the protection of various peripheral rights, for "without these peripheral rights, the specific rights would be less secure." 381 U.S. at 482-483. In *Griswold* and *Eisenstadt,* this Court implictly recognized the closely interrelated nature of the right to use and the right to access, by granting standing to represent the rights of *users* of contraceptives to those who in fact provided *access* to contraceptives. Thus, inherent in each of these decisions explicating the right to privacy, is the recognition that the broad reach of the personal privacy right encompasses the right of access to contraceptive devices and to information concerning them.[10]

Since the right to obtain and to have access to contraceptives has been unequivocally recognized as a fundamental right, a regulation such as the New York statute challenged by Appellees, which seeks to abridge that right, may be justified only by a "compelling state interest." Further, it is also the State's burden to demonstrate that

[10] Analogous findings were made in *Roe* v. *Wade* and *Doe* v. *Bolton,* in which it was held unconstitutional to prosecute doctors for performing abortions. Had the Court there found a disjuncture between the right to abortion and the right of access to abortion, it would have upheld laws under which doctors were prosecuted, and struck down only those under which pregnant women were prosecuted. It would be anomalous for this Court now to hold with regard to contraceptives that users may not be prosecuted but distributors may.

the statute in question is sufficiently narrowly drawn so as to serve only such legitimate state interests as are in fact present. See *Roe* v. *Wade, supra; Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Eisenstadt* v. *Baird, supra; Griswold* v. *Connecticut, supra; Lopez* v. *Wyman,* 329 F. Supp. 483 (W.D.N.Y. 1971), *aff'd* 404 U.S. 1055 (1972).[11]

While Appellees believe they have demonstrated that the rights here at issue are fundamental, and therefore require application of the test of compelling state interest, the statute must fall even if reviewed by the so-called "intermediate" test as applied by the three-judge court. See *Boraas* v. *Village of Belle Terre,* 476 F.2d 806 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974). That test requires that a statute be "carefully scrutinized" if it infringes upon a personal right; it may stand only if closely related in fact to a legitimate state interest. 476 F.2d at 814-815. See also *Reed* v. *Reed,* 404 U.S. 71 (1971); *Eisenstadt* v. *Baird, supra.* The three-judge court correctly found that Education Law §6811(8) could not meet even this lesser test of close relationship since it furthers no conceivable

[11] The Appellants contend (Appellants' Brief, p. 13) that *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), requires this Court to find the right of access to contraceptives not to be fundamental, but their contention is misplaced. The Court determined in *Rodriguez* that "education" was not a fundamental right, but recognized that the required standard of review for equal protection analysis was conditioned upon the fundamentality of the underlying interest. In *Rodriguez,* the Court acknowledged that "implicit" constitutional rights can be equal in dimension to "explicit" rights. In any event, as demonstrated, the individual's interest in sexual intercourse and its consequences and in procreation has been judicially recognized as a fundamental right.

state interest; thus the question of whether access to contraceptives is fundamental was not reached.

In the instant case, the result is the same whether the strict "compelling interest" test, the intermediate "substantial relationship" test, or even the most lenient and uncritical "rational relationship" test is utilized: As will be shown, none of the statute's proscriptions can be found to have even the most tangential relationship to any legitimate state interest, and the statute must therefore be struck down in its entirety.

POINT III

The statutory prohibition of sale or distribution of nonprescription contraceptives by all persons other than licensed pharmacists unconstitutionally infringes the fundamental privacy right of access to contraceptives.

Insofar as the New York statutes makes criminal the sale or distribution of nonmedical, nonprescription contraceptives, other than through a licensed pharmacy, by a licensed pharmacist, it is not only not supported by any compelling state interest, but it is absolutely illogical to the point of irrationality.

The District Court found (J.S. 18a, 19a) that there was "no doubt" that the limitation on sale or distribution of nonprescription contraceptives to licensed pharmacists only was a "significant" restriction on the constitutional right of access to such products. The Appellants' persistence in arguing that this restriction "does not raise a serious issue" (Appellants' Brief, p. 14) surpasses the limits of the credible, and is not based upon any facts in the record. Clearly,

the number of pharmacies in New York State is minuscule when compared with the total number of retail outlets which properly sell and distribute all manner of nonprescription products. Certainly, in many cases—and particularly in thinly populated areas—there are other retail outlets more accessible to the consumer than the nearest pharmacy. There are occasions, of course, such as nights and holidays, when the local pharmacy may be closed but another outlet open. Another factor, ignored by Appellants, is that a choice of retail outlets other than pharmacies would spare the purchaser the embarrassment which may deter him or her from purchasing such products at the local drugstore, and would provide a greater opportunity for privacy of selection and purchase.[12] Further, it would seem apparent that the State-created grant of a monopoly on sale or distribution of nonprescription contraceptives to pharmacists keeps the retail price of these products artificially high. In the absence of normal competition, this law prevents prices of contraceptives from seeking natural open-market levels. The above stated factors are but some of the more obvious ways in which the statute's "pharmacists only" restriction hinders the right of access to contraceptives.

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[12] As noted by Ellin Massey, the director of the Nassau County Coalition for Family Planning,

> "Pharmacists, who are in the front line of delivery of family planning services, frequently refuse to sell nonprescriptive contraception materials, such as foam or condoms, to young people of either sex, and often if teenagers are not refused outright, they are made to feel embarrassed or given a lecture on 'morality.' The law presently permits the sale of contraceptive devices to everyone regardless of age, but this is ignored by many pharamcists who are concerned about the present climate regarding family planning in the county, as well as possible repercussions from the community." Massey, *Nassau Family-Planning Crisis*, New York Times, August 8, 1976, Section 11 (Long Island Weekly) at p. 18.

This provision limiting sale and distribution of nonmedical contraceptives to pharmacists may not be justified as a "health" measure since no one can be harmed by the use of such products. Its purpose and effect are rather to restrict the use of contraceptives, for reasons which Appellants admit have nothing to do with public health.

The Appellees do not challenge the power of the State to restrict in a proper fashion those contraceptives requiring a prescription, such as birth control pills, intrauterine devices and diaphragms, to sale or distribution by licensed pharmacists. Indeed, such restrictions are properly imposed not only by the State, but by the United States Food and Drug Administration. See 21 U.S.C. §§331 *et seq.* Where, however, the commodity in question is, as here, a small inert plastic or rubber sleeve which poses no health hazard, and which does not require a prescription, a requirement limiting sale to pharmacists is irrational.

In *Baird* v. *Eisenstadt,* 429 F.2d 1398 (1st Cir. 1970), *aff'd* 405 U.S. 438 (1972), the Court of Appeals for the First Circuit and the Supreme Court took judicial notice that many contraceptive devices, including, specifically, the condom, present no risk of dangerous health consequences. In this regard, the First Circuit stated:

> "In addition, we must take notice that not all contraceptive devices risk 'undesirable • • • [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the

> legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products. • • • [W]e may assume, broadly, that not all chemical compounds are inherently dangerous. The legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless." 429 F.2d at 1401.

In affirming the decision of the First Circuit in *Eisenstadt,* Mr. Justice Brennan's plurality opinion joined in this finding "in noting that not all contraceptives are potentially dangerous." 405 U.S. at 451. The concurring opinion of Justices White and Blackmun went even further, and would have granted relief solely on the ground that the Massachusetts statute, by placing a medical restriction on a non-hazardous product ("Emko" vaginal foam), unconstitutionally burdened the fundamental right of distribution and use of contraceptives. Justices White and Blackmun stated as follows:

> "Just as in Griswold, where the right of married persons to use contraceptives was 'diluted or adversely affected' by permitting a conviction for giving advice as to its exercise, [381 U.S.] at 481, *so here, to sanction a medical*[13] *restriction upon distribution of a contraceptive not proved hazardous to health would impair*

[13] Appellants assert that §6807(b) of the New York Education Law allows physicians to distribute nonprescription contraceptives to their patients, regardless of age. Appellees dispute this interpretation of the statute. The three-judge court did not decide this question. Rather, it assumed, for the purpose of ruling on the "pharmacists only" and "minors" restrictions, that doctors could dispense nonmedical contraceptives. Nevertheless, it held these provisions constitutionally infirm.

the exercise of the constitutional right." 405 U.S. at 464. (Emphasis supplied.)

Since the provision limiting sales and distribution of nonmedical contraceptives to licensed pharmacists cannot possibly be demonstrated to be a valid health measure,[14] it is patently overbroad. The justifications put forth by the Appellants in support of the validity of this provision are of the flimsiest character when balanced against the fundamental nature of the rights infringed. Appellants posit that the provision is justified by administrative convenience, by the need to have knowledgeable persons dispensing contraceptives, by a need for quality control, and by a concern that young people not sell contraceptives (Appellants' Brief, pp. 9, 14).[15] The first of these, administrative convenience in enforcing the remainder of the statute, is clearly inapposite, because the entire statute is unconstitutional. Moreover, as the court below found, even if the other provisions were valid, there is no perceptible reason why pharmacists can better limit sale to young persons or prevent advertising and display than other storekeepers. Even

[14] The cruel paradox of the New York law is that it is in fact an *anti*-health measure. By limiting access to condoms—an effective preventive measure against syphilis and gonorrhea—this law contributes to the spiraling epidemic of venereal disease and the increase of unwanted births to female adolescents. See S. GORDON, THE SEXUAL ADOLESCENT, 81-91 (Duxbury Press, 1973); see also REPORT OF THE NATIONAL COMMISSION ON VENEREAL DISEASE (U.S. Government Printing Office, 1972); POPULATION AND THE AMERICAN FUTURE: REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE (New American Library, 1972); E. MOORE AND H. WILSON, CHILDREN BEARING CHILDREN (Institute for Suburban Studies of Adelphi University and Nassau County Coalition for Family Planning, 1976).

[15] This novel suggestion of a state interest that young people not sell such products was neither asserted in any of Appellants' prior memoranda, nor considered in the court below.

if they could, mere considedrations of administrative convenience here are not so weighty as to permit infringement of constitutional rights. *See*, e.g., *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Id.* at 41-44 (Burger, C.J., concurring); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Almenares* v. *Wyman*, 334 F. Supp. 512 (S.D.N.Y.), *aff'd as modified*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972).

The Appellants have wholly failed to provide any demonstrable or rational reason why a person with the knowledge and background of a pharmacist is needed to sell or distribute these nonprescription items, as opposed to the numerous other proprietary products dispensed by the normal panoply of purveyors. Moreover, in light of the display ban, the prospective purchaser of contraceptives could gain little knowledge of the varying brands of products by inquiring of the pharmacist. In any event, advice as to types or brands of nonmedical contraceptives hardly seems necessary since most of the products differ from each other only in price, See GORDON, THE SEXUAL ADOLESCENT, *supra*, at 57.

This provision may not alternatively be upheld as a control on quality. These products are not compounded or manufactured by the pharmacist, but arrive pre-packaged, and the pharmacist has no more control over quality than any other retailer would have, nor does he have any more control over quality of these products than he does over the quality of the toothpastes he sells.[16] In any case, quality control of these products is accomplished by the Federal

[16] The Appellants have not asserted that it is now the practice or likely to become the custom that the pharmacist would remove each nonmedical contraceptive from its sealed container and inspect it or test it prior to delivery to the purchaser. Indeed, if such

government, 21 U.S.C. §321(h), and the Food and Drug Administration has and exercises the power to set standards and to test contraceptives and seize those which fail to measure up.

Finally, the statute is far too overbroad as a means of preventing young persons from *selling* contraceptives. There are much narrower ways of accomplishing the same goal, such as legislating as to the required age of sellers of contraceptives. When it is permissible at all to burden the exercise of a constitutional right, the least restrictive alternative must of course be used. See, e.g., *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

Plainly, none of these purported justifications supports this provision of the statute. Since it is a significant burden on the fundamental right to have access to and to obtain contraceptives, and is unjustified even by any rational, much less a compelling reason, it is patently in violation of the Ninth and Fourteenth Amendments to the United States Constitution.

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inspections were necessary for quality control, they could be accomplished more narrowly at the level of the wholesaler or manufacturer, thereby reducing the burden on the exercise of a constitutional right.

POINT IV

The statutory proscription against sale or distribution of nonprescription contraceptives to minors under the age of sixteen is an improper denial of the fundamental right of privacy and a violation of the right to equal protection as guaranteed by the Fourteenth Amendment.

The right to use and to have access to contraceptives which this Court has clearly spelled out in *Griswold* v. *Connecticut, Eisenstadt* v. *Baird, Roe* v. *Wade* and *Doe* v. *Bolton,* all *supra,* cannot be denied to minors even under the guise of protecting them. It is hornbook law that children do not stand outside of the protections of the Constitution, and that they are not disenfranchised from fundamental constitutional guarantees such as the right of privacy. A State may not excise a child's constitutional prerogatives upon the grounds of misguided paternalism or, as is urged by Appellants here, to "regulate morality" (Appellants' Brief, p. 15).

In *Planned Parenthood of Central Missouri* v. *Danforth,* —— U.S. ——, 96 S. Ct. 2831 (1976), the Court put to rest the Appellants' argument that because "minority as a classification has always had judicial sanction" (Appellants' Brief, p. 16), the State may constitutionally deny minors under sixteen access to contraceptives. In holding that minors were protected by the constitutional privacy right and thereby declaring unconstitutional a Missouri statute which required the written consent of a parent before an abortion could be performed on an unmarried woman under the age of eighteen, Mr. Justice Blackmun stated:

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, *e.g., Breed* v. *Jones,* 421 U.S. 519 (1975); *Goss* v. *Lopez,* 419 U.S. 565 (1975); *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969); *In re Gault,* 387 U.S. 1 (1967)." 96 S. Ct. at 2843.

See *Bellotti* v. *Baird,* —— U.S. ——, 96 S. Ct. 2857 (1976); *T—H—* v. *Jones, supra; Poe* v. *Gerstein,* 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom. Gerstein* v. *Coe,* —— U.S. ——, 96 S. Ct. 3202 (1976); *Planned Parenthood Association* v. *Fitzpatrick,* 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd sub nom. Franklin* v. *Fitzpatrick,* —— U.S. ——, 96 S. Ct. 3202 (1976); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah 1973); *Wolfe* v. *Schroering,* 388 F. Supp. 631 (W.D. Ky. 1974); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *State* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 260 (1975) (En Banc).

The need for recognition of a minor's privacy right of access to contraceptives is particularly compelling. In determining that a woman's decision to terminate her pregnancy was a fundamental privacy right, this Court, in *Roe* v. *Wade, supra,* 410 U.S. at 153, enunciated a standard which considered the need for the right and the consequences of its denial. The detrimental factors mentioned by the Court in *Roe*[17] are all present in even a more aggra-

[17] As already noted (See POINT II, *supra*), these include "Specific and direct harm medically diagnosable even in early pregnancy;" the fact that "[m]aternity or additional off-spring may force upon the woman a distasteful life and future;" the possibility of imminent psychological harm; the fact that the woman's "[m]ental and physical health might be taxed by child care;" "the distress,

vated fashion, and with greater force, when the State puts limits on access to contraceptives for sexually active minors.

This Court may note, as did the three-judge court (J.S. 15a-16a) that "some young persons under the age of sixteen, including some in New York State do engage in sexual intercourse and that the consequence of such activity is often venereal disease, unwanted pregnancy or both." Indeed, in a national survey of a sample of unmarried females aged 15-19, drawn from all income levels throughout the United States, sexual experience was reported by over 13% of the 15-year olds, with the proportion rising for each additional year of age to 46% among the 19-year olds. J. Kanter and M. Zelnick, *Sexual Experiences of Unmarried Women in the United States,* 4 FAMILY PLANNING PERSPECTIVES 9 (1972). More recent studies indicate that the percentage of sexually active unmarried females aged 15-19 has increased from 28% in 1971 to 36% in 1973, with the largest percentage increase (over 70%) being among 15-year-olds. J. Dryfoos, *Women Who Need and Receive Family Planning Services: Estimates at Mid-Decade,* 7 FAMILY PLANNING PERSPECTIVES 174 (1975).

By limiting access to contraceptives for minors who engage in sexual intercourse, the Appellants confront teenage women and men, while still children themselves, with the awesome responsibilities of parenthood. More and more often, the teenager ends up with an abortion or an un-

for all concerned, associated with the unwanted child;" "[t]he problem of bringing a child into a family already unable, psychologically and otherwise, to care for it;" and "the additional difficulties and continuing stigma of unwed motherhood." 410 U.S. at 153.

wanted child. See E. Moore and H. Wilson, *Children Bearing Children* (Institute for Suburban Studies of Adelphi University and Nassau County Coalition for Family Planning, 1976), at pp. 2-4, a demographic study of the suburban New York county of Nassau, where the authors set forth the following data: 79% of sexually active teenagers do not use contraceptives regularly; the 15-19 year-old age group in Nassau County experienced a consistently rising number of pregnancies from 1971 to 1974; the premature birth rate is 80% higher for teenage mothers than for women 20 years or over; 50% of all births to teenage mothers in Nassau County occurred out-of-wedlock; 40% of all the unwed mothers in Nasasu County in 1974 were teenagers; abortions to teenagers in Nassau County increased by 45.9% from 1971 to 1974; almost 60% of teenage pregnancies in Nassau County in 1974 ended in abortion; only one teenage pregnancy out of five ended in a live, legitimate birth in Nassau County in 1974.

The disastrous medical, social, psychological and economic consequences which these statistics demonstrate, and which in large part result from this restrictive law, have been noted by many other commentators. *See, e.g.*, Paul, Pilpel and Wechsler, *Pregnancy, Teenagers and the Law, 1974*, 6 Family Planning Perspectives, 142, at 144 (1974); Note, *A Minor's Right to Contraceptives*, 7 U. Cal. Davis L. Rev. 270 (1974); Mencken, *The Health and Social Consequences of Teenage Childbearing*, 4 Family Planning Perspectives 45 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 Harv. L. Rev. 1001, at 1009-1010 (1975). As the Commission on Population Growth and the American Future (created by Congress and appointed by former

President Nixon, points out in its published report, Population and the American Future, at 145 (New American Library ed., 1972):

> "Out-of-wedlock births among people aged 15 to 19 are increasing in the United States. In 1965, there were 125,000 children born to unwed teenage mothers; in 1968, the figure rose to 160,000. By 1970, the figure is estimated to have risen to 180,000. The proportion of out-of-wedlock births among 15- to 19- year olds rose from 15 percent in 1960 to 27 percent in 1968.
>
> "Unwed mothers are less likely than married mothers to have adequate prenatal care; and children born out of wedlock are more likely to be born prematurely and to die in the first year after birth. Adequate provision of contraceptive information and services, regardless of age, marital status, or number of children, is likely to reduce rates of out-of-wedlock pregnancy."

It is thus apparent that the interest of minors in access to contraceptives is one of fundamental importance, and is equal in every regard to the privacy rights accorded to adults. The burden therefore falls upon the Appellants, to justify the provision limiting minors' access to contraceptives by showing a compelling State interest, and to show that the legislation is narrowly drawn to serve only the legitimate State interest thus demonstrated. The Appellants have wholly failed to make this required showing, or even to demonstrate that the statute is rationally related to any proper goal.

The sole reason proferred by Appellants in support of the State's infringement of the minors' constitutional right of access to contraceptives is "expressing societal disap-

proval of sexual activity by pre-teenagers and those in their early teens" (Appellants' Brief, p. 9). The Appellants thus argue that the deterrence of teenage sexual conduct (whether licit or illicit they do not always make clear) is the compelling State interest behind the statute.

Even if the Court were to assume *arguendo* that the State could regulate the morals of minors in this regard (a proposition which Appellees strongly dispute), the statute would still be constitutionally infirm since there is no rational relation between the restriction of the constitutional right and the subject of State concern here—teenage morality. Contrary to the unsupported assertions of the Appellants, *raised for the first time in this Court,*[18] There is no evidence that teenage sexual conduct increases in proportion to the availability of contraceptives. In point of fact, the data leads overwhelmingly to the conclusion that contraceptive availability does not lead to increased sexual activity. See Settlage, Baroff & Cooper, *Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance For The First Time,* 5 FAMILY PLANNING PERSPECTIVES 223 (1973); Pilpel & Wechsler, *Birth Control, Teenagers*

[18] It is to be observed that the Appellants' contention that increasing availability of contraceptives increases teenage sexual activity (Appellants' Brief, p. 21) was not argued by the State in any of the proceedings before the three-judge court. Indeed, as noted in the decision of the three-judge court (J.S. 15a), the State in a Memorandum of Law, submitted to that Court, conceded that "there is no evidence that teenage extramarital activity increases in proportion to the availability of contraceptives * * * ." (Appellants' Memorandum of Law dated August 1, 1974 at p. 23). The opposite contention, now submitted by the State without any support in the record, is inconsistent with the theory which it put before the three-judge court and for that reason alone, it is not properly presented here. See *Cort* v. *Ash,* 422 U.S. 66, at 72 n. 6 (1975); *Rondeau* v. *Mosinee Paper Corporation,* 422 U.S. 49, at 61 n. 11 (1975); *Neely* v. *Eby Construction Co.,* 386 U.S. 317 (1967).

and the Law: A New Look, 1971, 3 FAMILY PLANNING PERSPECTIVES 37 (1971); Stein, *Furnishing Information and Medical Treatment to Minors for Prevention, Termination and Treatment of Pregnancy,* 5 CLEARINGHOUSE REVIEW 131, at 152 (1971); I. L. Reiss, *Contraceptive Information and Morality,* 2 JOURNAL OF SEX RESEARCH 51 (1966).

The statute therefore plainly lacks a fair and substantial relationship to a legitimate State objective.[19]

Thus, in order to promote some abstract notion of morality, the Appellants are willing to visit upon thousands of minor citizens, the terrible harvest of tragedy and despair which are the real consequences of this enactment. Where, as has been shown, the restriction imposed by the State harms the minor and the removal of that restriction would be of benefit, the law can hardly be claimed to have any constitutionally sufficient justification for its existence. In such circumstances, the blanket assertion of "regulating morality" cannot suffice. Indeed, there is room for doubt whether the State enjoys any legitimate interest in maintaining legislation of this character for the purpose of fostering a particular moral climate. In *Roe* v. *Wade,*

[19] The three-judge court also noted "the existence of substantial statutory exceptions" to the provision prohibiting distribution of contraceptives to minors under the age of sixteen (J.S. 16a). Reference was made in particular to Section 350(1)(e) of the New York Social Services Law, implementing the federal program of aid to needy families with dependent children, which obliged the State to provide family planning services and supplies to eligible sexually active children, regardless of age. See also New York Social Services Law §365-a(3)(c).

Additionally, under the New York Domestic Relations Law, §15-(2)-(3), a woman at age fourteen may be married. Surely, it is incongruous that any such person, once married, could then have limits placed upon her right to make a private, marital decision as to whether to bear a child.

supra, where the plaintiff was an unmarried, pregnant woman, the Court omitted any reference to a justifiable state interest in deterring illicit sexual conduct. After noting in *Roe* that Texas did not offer this rationale as a justification for its anti-abortion statute, Mr. Justice Blackmun observed that "it appears that no court or commentator has taken the argument seriously." 410 U.S. at 148. See also *Poe* v. *Gerstein, supra,* 517 F.2d at 792; *Baird* v. *Lynch, supra,* 390 F. Supp. at 751; Note, *On Privacy, supra,* at 719-738; Note, *Parental Consent Requirements and Privacy Rights of Minors*: *The Contraceptive Controversy, supra,* at 1011.

The effect of this statute is to attempt to deter teenage sexual conduct by potentially punishing fornication with venereal disease, with pregnancy, illegitimate birth or abortion. The Court has already recognized that a State cannot punish "immoral conduct" in this fashion. In *Eisenstadt* v. *Baird, supra,* it was ruled that a statute banning distribution of contraceptives to all unmarried persons could not be supported by any purported rationale of deterring premarital sex. What Justice Brennan wrote in that case is equally pertinent to the New York restriction on distribution of contraceptives to minors:

> "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication • • • . Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proferred objective." 405 U.S. at 448.

Since the results of the New York statute are precisely those condemned by Justice Brennan, it is patently an unconstitutional abridgement of the privacy rights of minors.

Many of the arguments offered by Appellants in a grab-bag fashion to support the restriction on access to contraceptives for minors are so lacking on their face as to warrant little or no comment. The State's contention that the age limitation in this statute must be upheld because if the State could not classify people by age, children would be voting and drinking and handling obscene materials, is baseless and irrelevant (Appellants' Brief, p. 16). Statutes aimed at the prevention of those activities which might conceivably be harmful to children, or society, are quite different from statutes aimed at withholding the use of products which prevent harm to children or society. Education Law §6811 is a statute of the latter type, and it is therefore a denial of privacy rights and of equal protection to minors because it prevents them from minimizing the harm that may come to them and to society if they engage in sexual intercourse.

Appellants' tortured assertion that the restriction of contraceptive access for minors is not a factor in lack of contraceptive use by teenagers is preposterous, and is unsupported even by Appellants' own limited evidence. They refer to R. C. Sorensen, Adolescent Sexuality in Contemporary America—Personal Values and Sexual Behavior Ages 13-19 (1973) (Appellants' Brief, p. 18); this study has been severely criticized by demographic experts because its sample of adolescents was unrepresentative. See J. F. Kantner, 5 Family Planning Perspectives, pp. 124-125 (1973), in which Kantner notes that, because of the skewed sample, the survey is, at best, inconclusive. The

other study relied upon by Appellants, S. N. SCHOFIELD, THE SEXUAL BEHAVIOR OF YOUNG PEOPLE (1965), was based upon interviews with adolescents in London, England—a fact not disclosed in Appellants' brief. Such a study patently has no application whatsoever in New York or in the United States due to vastly different populations and other demographic factors.[20]

In addition to its clear infringement upon the privacy rights of minors, this statute is plainly violative of the Equal Protection clause of the Fourteenth Amendment. No fair and substantial basis exists for differentiating between persons over and under the age of sixteen with respect to access to contraceptives. Adolescents under the age of sixteen, like adults, engage in sexual intercourse and are capable of conceiving children, contracting venereal disease or having an abortion. As demonstrated, minors risk greater detriments from intercourse without contraception than do adults. The artificial age limitation is irrational because it fails to take into account emotional and intellectual maturity. Cf. *Bellotti* v. *Baird, supra.*

In sum, it is crystal clear that no constitutionally adequate justification whatever exists for denying nonmedical contraceptives to minors. Such denial jeopardizes the minor's health and does not deter him or her from sexual activity. In the light of the demonstrated present day

[20] Appellants' reference (Appellants' Brief, p. 20) to A. ETZIONI, GENETIC FIX, 162-164 (1973) is patently misleading. The language Appellants refer to in describing the Etzioni study ("current technology offers no contraceptive device that fully meets the standards of acceptability, effectiveness and safety") is taken verbatim from Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, supra,* at 1007, n. 40. Appellants omit, however, the statement of the Note's author that "on balance, these risks are relatively slight."

realities, the anachronistic notion of regulating morals reflecting the Comstockian mores of a prior era, is without substance. That the dangers of potential pregnancy, abortion, illegitimate birth and venereal disease are imposed upon minors by the State of New York merely because they are under sixteen, and despite the fact that they are known to engage in sexual conduct disregarding the risk of these dangers, is unconscionable, and a violation of the constitutional rights of privacy and equal protection. The State has not even a rational interest, much less a compelling one, which can support such a violation of the fundamental constitutional right of a minor to have access to and to obtain and use contraceptives.

POINT V

The complete suppression of display or advertisement of nonmedical contraceptives is an unconstitutional prior restraint in violation of the First Amendment as well as an unconstitutional burden upon the protected right to use and to have access to such products.

The New York law places an absolute ban on display or advertisement of all contraceptives, including nonmedical contraceptives. Any violation of this provision is a Class A misdemeanor, subjecting the offending advertiser or displayer to a prison term of up to one year and/or a fine not exceeding $1000 (New York Penal Law, §§70.15, 80.05). New York has thus undertaken to "contract the spectrum of available knowledge," *Griswold* v. *Connecticut, supra,* 381 U.S. at 482, and to suppress the flow of information which would enable individuals to deal with "matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird, supra,* 405 U.S. at 453.

This statutory prior restraint of free speech and expression bears a "heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, at 70 (1963); *New York Times Co.* v. *United States,* 403 U.S. 713, at 714 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, at 57 (1965); *Thomas* v. *Collins,* 323 U.S. 516, at 529-530 (1945); *Near* v. *Minnesota,* 283 U.S. 697 (1931). The State "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, at 419 (1971); *New York Times Co.* v. *United States, supra,* 403 U.S. at 714. Speech—such as that banned here—cannot be prohibited unless there is an immediate danger that the words used will directly and imminently bring about a substantive evil which the State may prevent. *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

Appellants do not dispute that the statute here challenged is in fact a prior restraint. Instead, they seek to withdraw the speech thereby prohibited from the realm of the protection of the First Amendment by calling it "commercial." However, any remaining question as to whether there is a "commercial speech" exception to the First Amendment was swept aside by the Court in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* —— U.S. ——, 96 S. Ct. 1817 (1976), wherein it was held that a statute which prohibited prescription drug price advertising was unconstitutional. In *Virginia State Board of Pharmacy,* the Court answered clearly and unequivocally the question left open in *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809, at 825 (1975) ("[t]he precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate

or even prohibit").[21] The Court in *Virginia State Board of Pharmacy* squarely held that speech which did no more than advertise a commercial transaction was protected by the First Amendment, even though the advertiser's interest was purely economic.[22]

This statute, like the Virginia statute under scrutiny in *Virginia State Board of Pharmacy,* cannot survive constitutional review. Section 6811(8) of the New York Education Law is, like the Virginia statute, an improper attempt which "singles out speech of a particular content" and "completely suppress[es] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its . . . recipients." 96 S. Ct. at 1830, 1831. See also *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (N.D. Cal. 1975),

[21] The advertising in this case is, of course, related to an activity —contraception—which the State cannot legitimately prohibit or improperly restrict. The prohibition against advertising or displaying nonmedical contraceptives denies to the Appellees their rights of free speech, their rights to carry out lawful associational and advocacy activities concerning the fundamental right to use and distribute contraceptives, and denies to New York residents the knowledge and information otherwise lacking, which is necessary to enable them to make an informed decision as to whether to bear children, thereby also impinging upon their First Amendment rights and privacy rights. *Griswold, Eisenstadt* and *Roe* v. *Wade,* all discussed *supra,* demonstrate that individuals have a fundamental right to privacy and personal choice in matters of sex and family planning. This right encompasses the decision regarding whether to use contraception for family planning, and what types or methods of contraception to use. As the Court held in *Bigelow* v. *Virginia, supra,* commercial advertisements relating to a fundamental privacy right cannot be banned by the State.

[22] Thus, the conclusion of the three-judge court (J.S. 35a) that the advertisements placed by Appellee Population Planning Associates were purely commercial speech and not constitutionally protected is erroneous and in conflict with this Court's holdings in the *Bigelow* and *Virginia State Board of Pharmacy* decisions.

aff'd, —— U.S. ——, 96 S. Ct. 2617 (1976); *California Citizen Action Group* v. *Dept. of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1975), *vac. and remanded sub nom. California State Board of Optometry* v. *California Citizen Action Group*, —— U.S. ——, 44 U.S.L.W. 3702 (1976); *Pennsylvania State Board of Pharmacy* v. *Pastor*, 441 Pa. 186, 272 A.2d 487 (1971); *Anderson, Clayton & Co.* v. *Washington State Dept. of Ag.*, 402 F. Supp. 1253 (W.D. Wash. 1975); *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (E.D. Mich. 1972); *Atlanta Co-Op News Project* v. *United States Postal Service*, 350 F. Supp. 234 (N.D. Ga. 1972) (three-judge court).

The instant case is surely one which, under any relevant criterion, requires that the challenged total ban on advertising of contraceptives be declared unconstitutional. The advertising here concerns a fundamental constitutional right, as did that in *Bigelow*. Appellees' concern is that all persons receive the knowledge that will enable them to exercise their constitutional right of privacy.[23] Moreover, there is no State interest which is sufficiently compelling, rational or even legitimate, which is substantially related to the suppression of information regarding contraceptives.

[23] As stated in the REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, *supra*, at p. 168:

> "One way or another, these laws inhibit family planning programs and/or impinge on the ready availability of methods of contraception to the public. By prohibiting commercial sales, advertising displays and the use of vending machines for nonprescription contraceptives, they sacrifice accessability, *education* and individual rights in the interest of some undefined purpose. Whatever the original justification for these laws, *their result is to prevent contraceptive information* and supplies from being easily obtainable in general and, in some instances, to make them unobtainable." (Emphasis supplied.)

In support of this complete censorship,[24] Appellants offer two purported State interests which are allegedly served by the ban on contraceptive advertising or display contained in Education Law §6811(8). One is that individuals not be exposed to purported embarrassment from such advertising and display. The other is that such advertising and display will lead to legitimization and increase of sexual activity among young people.

As to the first contention, it is sufficient to note that protected speech will not be rendered the less so because it is found offensive by some people. *Cohen* v. *California*, 403 U.S. 15 (1971); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, at 209 (1975). As to the State's second assertion of an interest in deterring promiscuity among the young, Appellants have presented no evidence whatsoever that any such result would occur, and it seems certain that if they could not show that actual access to contraceptives will increase sexual activity, it is not possible to conceive that they could show that information about contraceptives will lead to such an increase. Such unprovable assumptions cannot support the infringement of First Amendment or constitutionally protected privacy rights. The State might just as logically forbid the display or advertising of water beds, bikini bathing suits, perfumes and the like.

[24] Appellants' contention (Appellants' Brief, p. 26) that the statutory total bar on display and advertisement of nonmedical contraceptives is constitutionally valid because information about contraception is available from other sources is, of course, manifestly meritless. As this Court stated in *Virginia State Board of Pharmacy, supra*, 96 S. Ct. at 1823, n. 15: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means • • • ."

Again, even if one were to assume that the State had a legitimate interest in regulating moral conduct of the young, this interest would hardly be sufficient to sustain the prior restraint and total ban on speech which the statute imposes. Because §6811(8) of the New York Education Law prohibits all advertisements or displays of contraceptives, irrespective of content, context, form or substance, it cannot be sustained by reason of any State interest relating to minors. As the Court stated in *Erznoznik* v. *City of Jacksonville, supra,* at 213-214, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." The well reasoned conclusion of the three-judge court in *Associated Students, U. of Cal. at Riverside* v. *Attorney General, supra,* 368 F. Supp. at 22, n. 3 (overturning the provision of the federal law which barred the mailing of unsolicited information about contraceptives), is apposite:

> "Any governmental interest in preventing the corruption of public morals cannot justify the infringement on the freedom of speech and the right to privacy that this statute entails. This is particularly so where, as here, the governmental interest that the statute is asserted to further is based upon a personal judgment on which there is a great divergence of views among the public." [25]

[25] Bills seeking to repeal Section 6811(8) of the Education Law have had the support of many organizations, inclding the New York State Council of Churches, the NAACP, the Union of American Hebrew Congregations, and Planned Parenthood of New York City, Inc. Indeed, the American Bar Association has adopted a resolution urging "that states eliminate existing restrictions on access to contraceptive information, procedures (including voluntary contraceptive sterilization) and supplies," and has recommended as part of that resolution that states "develop affirmative legislation which will permit minors to receive contraceptive information and services." 13 Crim. L. Rptr. 2438 (August 15, 1973).

Likewise, the claim made by the State in this case that the ban of display and advertisement of nonmedical contraceptives is supported by a proper governmental interest in regulating sexual behavior of younthful New York residents is erroneous.

Lastly, the statute is overbroad, as was found by the three-judge court. By its terms, it limits *any* publication of information regarding contraceptives, whatever the form and whoever the source. Thus, even if a statute could be written to regulate some contraceptive advertisements, this statute is clearly unconstitutional. See *Bigelow* v. *Virginia, supra; Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973); *Dombrowski* v. *Pfister,* 380 U.S. 479, at 486 (1965); *Erznoznik* v. *City of Jacksonville, supra; Doran* v. *Salem Inn, Inc.,* 422 U.S. 922 (1975).

New York's total suppression of advertisements or displays of nonmedical contraceptives is plainly repugnant to the First Amendment and therefore should be struck down.

CONCLUSION

Appellees respectfully submit that each provision of §6811(8) of the New York Education Law is unconstitutional and urge that this Court affirm the judgment of the three-judge court.

Dated: October 4, 1976.

Respectfully submitted,

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• Attorneys for Appellees gratefully acknowledge the assistance provided in the preparation of this brief by Ms. Karen E. Wagner, a graduate of New York University Law School, and Ms. Susan L. Solomon, second year student at Rutgers University School of Law.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-433 **75-443**

HUGH CAREY, individually and as Governor of the State of New York, LOUIS J. LEFKOWITZ, individually and as Attorney General of the State of New York, ALBERT J. SICA, individually and as Executive Secretary of the Board of Pharmacy of the State of New York; and BOARD OF PHARMACY OF THE STATE OF NEW YORK,

Appellants,

against

POPULATION SERVICES INTERNATIONAL, DR. ANNA T. RAND, DR. EDWARD ELKIN, DR. CHARLES ARNOLD, THE REVEREND JAMES B. HAGEN, JOHN DOE and POPULATION PLANNING ASSOCIATES INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

A.

Appellees Population Planning Associates, Inc. and James B. Hagen have no standing to maintain this action.

Appellees Population Planning Associates, Inc. and James B. Hagen fail to allege an injury sufficient to war-

rant the exercise of jurisdiction in this case. The Board of Pharmacy has been aware of the activities of Population Planning Associates, Inc. since at least December 1, 1973 and yet has never initiated any legal action against it. Insofar as appellee Hagen is concerned, the Board of Pharmacy has not been aware of his activities at all. Moreover, there has been no prosecution under New York Education Law §6811(8) or any predecessor statute since 1965. Under these circumstances, neither appellee has alleged an "'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction . . .". *Singleton* v. *Wulff*, 96 S. Ct. 2868 (1976) (court found injury to physicians where they had not been paid for rendered medical treatment). *Compare Planned Parenthood of Central Missouri* v. *Danforth*, 96 S. Ct. 2831 (1976) (recent statute, suit instituted 5 days after enactment); *Doe* v. *Bolton*, 410 U.S. 179 (recently enacted statute, fear of prosecution not chimerical); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (lack of justiciable controversy not urged by State, record lacking facts to warrant conclusion controversy is not live).

Even assuming an injury, appellee Population Planning Associates, Inc. is not a proper party to raise the privacy rights of third parties. Appellees have failed to cite a case where a comercial relationship between a seller and buyer was sufficient to permit the seller to raise the *privacy* rights of a buyer. *See Singleton* v. *Wulff, supra. Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976), and *Bigelow* v. *Commonwealth of Virginia*, 421 U.S. 809 (1975), are not in point since they were first amendment cases where the parties involved were asserting their own first amendment rights.

B.

Every New Yorker has access to contraceptive products and New York State has reasonably limited their distribution by pharmacists and physicians where children under sixteen are involved.

New York in providing that only licensed pharmacists or physicians where children under sixteen are concerned may distribute contraceptives has merely regulated the sources from which individuals may obtain contraceptive products. The statutory scheme attacked by appellees does not reach the level of "governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), and appellees' statement that "[t]his Court has made it manifestly plain that there is a constitutional privacy right . . . to have access to" contraceptive products is without support in the case law of this Court (Appellees' Brief, p. 21). Indeed, in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), this Court specifically held that the issue in that case concerned a right within the zone of privacy created by several fundamental constitutional guarantees since it involved the *use* of contraceptives by married couples and did not merely involve the regulation of their manufacture or sale. *Griswold, supra* at 485.

In short, a State may regulate access to contraceptives and such regulations must only be reasonable and bear some rational relationship to legitimate state purposes. Section 6811(8) meets this test. Moreover, as noted in appellants' brief, p. 21, even if measured by the strict scrutiny test, Section 6811(8) is constitutional.

The provision of Section 6811(8) which limits sale of contraceptive products by licensed pharmacists is reasonable since it assures that only persons of mature years will

be involved in the sales of such products* (2) permits purchasers to inquire as to the relative qualities of the products and prevents anyone from tampering with them and (3) allows enforcement of the remaining provisions of Section 6811(8) by State Board of Pharmacy inspectors (New York Education Law § 6804).

Appellees, in an attempt to overcome these reasons for the regulation and invalidate it, claim that the regulation has allegedly undesirable consequences since, among other things, there may be occasions when an individual cannot purchase contraceptives since a pharmacy may be closed and another outlet open. Moreover, the regulation may operate to keep the retail prices of the products artificially high.** Aside from the speculative nature of such claims, the fact that a regulation may not be all things to all people does not render it susceptible to constitutional attack as long as it is reasonable and rationally related to a legitimate state purpose.

Insofar as appellees argue for outright availability of contraceptives to children under sixteen, they have assumed without proving that such availability will lead to less unwanted pregnancies and a decrease in the incidence of veneral disease. However, the New York legislature could and did conclude that such unlimited availability would sanction and lead to increased sexual activity by

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* Appellees state that this argument was not raised below. However, appellants' memorandum before the three judge court (Defendants' Memorandum of Law, January 13, 1975, p. 4) specifically noted the concern of New York legislators that young clerks in supermarkets, who are frequently young girls, not be the victims of undesirable comments and gestures by permitting their exposure to individuals purchasing contraceptives (See debate on Assembly Bill 6843-B, April 18, 1974). Moreover, contrary to the assumption of the brief as *amici curiae* for Planned Parenthood Federation of America, Inc. and Association of Planned Parenthood Physicians, Inc. (pp. 23-24), Section 6811(8) limits the sale of contraceptive by licensed pharmacists only and does not permit sale by clerks employed by a pharmacist.

** This argument is raised in this Court for the first time.

very young persons, who frequently do not use contraceptives even if available, and instead of decreasing unwanted pregnancies and the incidence of veneral disease, would increase them.* Indeed, the briefs of the appellees and *amici* in this Court support this conclusion of the State legislature. For example, the brief of the appellees, p. 40, states that a demographic study of Nassau County, New York found that 79% of sexually active teenagers do not use contraceptives and that the 15-19 year old age group in Nassau County experienced a consistently rising number of pregnancies from 1971 to 1974. However, since most of these teenagers can readily purchase contraceptives from pharmacists, Nassau County having an abundance of pharmacies, these statistics only lend credence to the fact that youngsters will not use contraceptives even where available rendering the sanctioning of sexual activity most undesirable.

As for the studies cited by the brief of the American Civil Liberties Union, they have no bearing on the reasons for Section 6811(8) (pp. 14-15). Referring to a Los Angeles study, the brief relates that 96 percent of the girls studied were already sexually active when they came for contraception and 58 percent had been active for over a year. The brief recites that the inescapable inference from this data is that the request for contraception follows established sexual practices and does not stimulate it. How-

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* Appellees' brief (p. 42, footnote 18) erroneously asserts that appellants did not argue before the three judge court that increasing the availability of contraceptives increases sexual activity among children. This was exactly the point made before the three judge court. (Defendants' Memorandum of Law, July 13, 1975, pp. 18, 22, 24, 25). Moreover, the statement required by Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York specifically put in issue appellees' contention that there is no evidence that teenage extramarital activity increases in proportion to the availability of contraceptives (65a), and appellees' reference to a statement made before the single district court judge was for the limited purpose of opposing the convening of a three judge court and for judgment on the pleadings.

ever, this inference, even if true, is irrelevant to the issue at hand since insofar as related in the brief, the study does not address itself to what prompted the sexual activity in the first place. It additionally points up the fact that notwithstanding availability, the girls had sexual intercourse at their risk. Moreover, New York youngsters may similarly go to clinics to obtain contraceptive products.

As for another study cited in the same brief based on a national probability sample of 411 adolescents aged 13 to 19, again this study is irrelevant to the issue at hand since it also fails to analyze the incidence of sexual activity *vis-avis* the availability to contraceptives. Insofar as the virgin adolescents answered that they had not had sexual intercourse, "Because I'm not ready for it", it appears that societal standards of morality will affect a youngster's decision whether to engage in sexual activity. Finally, the brief notes that fear of pregnancy is apparently not a deterrent to youngsters otherwise disposed to begin sexual activity and accordingly, the availability or non-availability of contraceptive products would have no effect on the number of unwanted pregnancies or incidence of venereal disease since there would be no incentive for their use.

The briefs submitted by the appellee and the *amici* in this Court are replete with citations of studies and statistical analyses regarding the sexual experiences and attitudes of children, making clear that the circumstances under which children should be permitted to purchase contraceptives is best left to the legislature and is not a question appropriately presented to a court.* Furthermore,

* The brief as *amici curiae* for Planned Parenthood Federation of America argues independently and on its own that Section 6811(8) denies minors under sixteen the equal protection of the laws (pp. 20-22). Apart from the complete lack of support in the record for its reading of the sections of the Social Services Law cited (See brief for appellants, footnote, p. 15) or the actual practice in New York, since this argument raises a question of the interpretation of a state law, a state court determination of this claim would obviate the need for a constitutional decision and this claim should be raised in the New York Courts in the first instance.

the reliance by appellees and *amici* upon these independent studies and analyses, none of which was testified to and subjected to cross examination at any trial, points up the fallacy of the district court's grant of summary judgment. The judgment of the New York legislature in the instant enactment cannot be ignored by the studies and analyses as if they were the last word.

C.

New York, consistent with constitutional guarantees, has properly barred commercial advertisement and display of contraceptive products.

Appellees' assertion that commercial speech is protected by the First Amendment does not suffice to invalidate the advertising and display provisions of Section 6811(8). For ". . . the difference between commercial price and product advertising . . . and idealogical communication permits regulation of the former that the First Amendment would not tolerate with respect to the latter." *Young* v. *American Mini Theatres,* 44 U.S.L.W. 4999 (U.S. June 24, 1976).

The legislation under attack at bar relates to purely commercial advertisement and display. It is a reasonable regulation since notwithstanding appellees' unproved assertions to the contrary, it protects individuals from displays and advertisements of contraceptive products that may be offensive and embarassing to many and, in particular, prevents the unnecessary exposure of New York youths to the "teenage mythology" that a teenager is "exceptional because he has not had sexual intercourse". Schofield, *The Sexual Behavior of Young People,* 256.

CONCLUSION

The order of the District Court granting appellees summary judgment should be reversed and judgment entered for the appellants.

Dated: New York, New York, November 24, 1976.

Respectfully submitted,

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IN THE

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October Term, 1975

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against

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Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC. and ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS, INC.

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Consent to Filing of Brief as *Amici Curiae*

Pursuant to Rule 42(2) of this Court, *amici* have obtained written consent from the attorneys for all parties to this case, to the filing of this brief as *amici curiae*.

Opinion Below

The opinion of the three-judge panel of the United States District Court for the Southern District of New York was rendered on July 2, 1975, and is reported at 398 F.Supp. 321.

Statement of Interest of *Amici*

Amici Planned Parenthood Federation of America, Inc. ("PPFA"), Planned Parenthood of New York City, Inc. ("PPNYC"), and the Association of Planned Parenthood Physicians, Inc. ("APPP") are vitally concerned with the issues raised by the instant case in relation to the ready availability of essential contraceptive health services to the public at large and especially to minors.

Planned Parenthood Federation of America, Inc.

PPFA is a not-for-profit corporation organized in 1922 under the laws of the State of New York and exempt from Federal taxation under §501(c)(3) of the Internal Revenue Code. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning.

PPFA has 188 affiliates in 45 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate approximately 725 family planning clinics offering services to the public. All but twelve affiliates offer medical services.

PPFA provides its affiliates with guidance in the areas of contraception, voluntary sterilization, infertility, abortion, sex education and education for marriage and parenthood. Each of the affiliates offering medical services functions under strict medical standards promulgated by the National Medical Committee in conjunction with local medical committees. These committees are made up of health professionals, the large majority of whom are physicians.

PPFA also functions as a clearing house for information and services relating to the areas referred to above. It formulates medical and clinical standards which are available to its affiliates and generally on a nationwide basis and develops guidelines and materials relating to public and professional education in all aspects of family planning. Its Medical Director and other experts confer with other national medical organizations, medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of PPFA's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers from this country and foreign countries and provide referral services for their clients to qualified medical specialists and facilities.

It is the policy of PPFA that contraceptive services should be made available to sexually active minors. PPFA has a long-standing concern with the problems of unwanted out-of-wedlock teenage pregnancies. This concern is shared by prominent authorities in the field of medicine who have recognized that sexually active minors face many serious

health hazards to themselves and their children if they are not given access to medically approved fertility control methods.* The health hazards demonstrated by numerous studies to follow from teenage pregnancies include greatly increased risk of infant mortality, prematurity, stillbirth and perinatal or brain injury to the child born. In terms of maternal mortality and morbidity, the teenage mother is a "high risk" medically in almost every respect during pregnancy and childbirth. The social problems which arise are obvious. Among them are increases in: out-of-wedlock pregnancies and births (40% of out-of-wedlock births are to teenagers); school dropouts; likelihood of poverty and dependency for both parents and child; and "forced" marriages between immature young people with little or no likelihood of providing a stable home environment for themselves or their children.

* In Appellants' Brief herein it is stated that "Surveys have shown that although many teenagers do not use contraceptives, in most instances this is not due to the fact that they are unavailable." In support of this statement, Appellants cite Sorensen, *Adolescent Sexuality in Contemporary America: Personal Values and Sexual Behavior* 18 (1973) and Schofield, *The Sexual Behavior of Young People* (1965). Yet the Sorensen Report points out (at p. 319) that 89% of the girls surveyed with current intercourse experience who did not always take pregnancy precautions when having intercourse during the preceding months agreed with the statement, "I don't know where to get birth control pills or any other kind of reliable contraceptive." And Sorensen in a study conducted seven years after publication of his 1965 book following up the original group interviewed and presenting the results of a new survey of teenagers cites the difficulty women have in obtaining contraceptives along with the unpremeditated nature of teenage sex as a reason for teenagers' failure to use contraceptives. Schofield, *Sexual Behavior of Young Adults* 212 (1975). He also finds that premarital sex is accepted by most teenagers and that 97% of young people believe birth control should be taught in the schools.

Planned Parenthood of New York City, Inc.

PPNYC is the major voluntary family planning agency in the City of New York. It is a non-profit corporation organized under the laws of the State of New York and is exempt from federal taxation under §501(c)(3) of the Internal Revenue Code. It operates five state-licensed family planning clinics directly serving between 45,000 and 50,000 patients annually by providing medically-approved and medically-prescribed birth control methods, and by providing other fertility-related services and low-cost pregnancy tests. The fees charged by PPNYC are on a sliding scale based on ability to pay; Medicaid patients are included among those served.

The clinics are staffed with qualified gynecologists, registered nurses, and other specially trained personnel. All women patients receive Pap smears under a cancer prevention and detection program carried out in cooperation with Memorial Hospital for Cancer and Allied Diseases.

In addition to its direct clinic services, PPNYC operates the Family Planning Information Service (FPIS). FPIS is New York City's central source of free information and referral on birth control, abortion, infertility problems and voluntary sterilization. It is currently handling close to 4,000 inquiries a month. PPNYC also produces informational literature for city-wide distribution.

PPNYC's case load has consistently included a substantial number of young people. In December of 1973, for example, 32 percent of PPNYC's new patients were nine-

teen years of age or younger. PPNYC has adopted a policy of rendering contraceptive services to minors in appropriate cases in accordance with the official policy of PPFA. On the basis of its experience in this field over a period of many years, as well as its knowledge of the practice of many practitioners, hospitals and public health agencies, PPNYC believes that contraceptive service has been and is being rendered to minors under sixteen by many physicians and licensed health facilities in this state, and that this practice is in accord with the law of New York.

In order to help prevent unwanted pregnancies among minors, PPNYC is presently engaged in a two-year program designed to make available to adolescents in New York City counseling information regarding birth control, sex education, and needed medical services on a completely confidential basis. The program, to cost $4 million, includes the following activities: a special city-wide telephone number exclusively for teenagers; "walk-in" assistance at all five of PPNYC's medical clinics; provision of information, counseling and medical referrals through several special offices in various New York City neighborhoods; expansion of medical services and counseling sessions now provided; acceleration and intensification of programs reaching adolescents through the New York City school system; making available condoms at cost at all PPNYC facilities in accordance with established medical directives; training of teachers and other professionals who work with adolescents; distribution of educational materials; utilization, on a public service basis, of mass media and mass transit advertising; and the provision of information and guidance to parents of adolescents.

Association of Planned Parenthood Physicians, Inc.

PPFA works closely with APPP, a New York not-for-profit corporation organized in 1974. APPP is the successor to the American Association of Planned Parenthood Physicians, an unincorporated association which was organized in 1963. In 1974, APPP had 922 members, all of whom were physicians or other health professionals associated with family planning.

APPP was formed for scientific, educational and charitable purposes and specifically to promote the ongoing interest in family planning in order to improve the stability and health of the family through responsible parenthood.

Amici believe that this brief submitted on their behalf brings additional material to the Court's attention as to the law in New York State related to contraceptive services to minors and as to relevant statistical data which may not be otherwise available to the Court and which will assist the Court in its consideration of this case. *Amici* will not address the issue of standing but fully concur with the points made in Appellees' Brief.

Statutory Provisions Involved

New York State Education Law §6811(8) (McKinney 1972)

"It shall be a class A misdemeanor for:

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of six-

teen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy is hereby prohibited; * * *''

Questions Presented

(1) Does New York's prohibition of the sale or distribution of non-prescription drugs to minors under sixteen violate the constitutional rights of such minors?

(2) Does the prohibition by a state of the sale or distribution of contraceptives except by licensed pharmacies or physicians violate its citizens' constitutional rights?

(3) Does the prohibition by a state of the advertisement and display of contraceptive products violate the First Amendment of the United States Constitution as incorporated in the Fourteenth Amendment and also otherwise violate the Fourteenth Amendment?

Summary of Argument

This Court has already recognized that access to contraceptives is part of the fundamental right to privacy guaranteed to citizens through the Fourteenth Amendment to the United States Constitution. And as the court below recognized, and this Court recently held, this right belongs to minors as well as to adults. The provisions of the New York statute which purport to prohibit the sale and distribution of non-prescription contraceptives by pharmacies to minors under sixteen effectively deprive many minors of the

ability to exercise this fundamental constitutional right. The State has shown no compelling state interest, or even a rational basis, for such infringement of minors' constitutional rights. In fact, the State itself conceded in the lower court that there is no evidence that the availability of contraceptives encourages promiscuity among minors. There is no basis either for the State's new argument in this Court that the official ''disapproval'' of sexual activity on the part of minors under sixteen allegedly implied in the statute will serve to deter the sexual activity of such minors. On the other hand, there is substantial statistical evidence establishing that limiting the access of such minors to contraception has serious physical, social and economic consequences both for the minors and for any infants which may be born to them.

The limitation on the sale and distribution of contraceptives to minors under sixteen also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The New York Social Services Law requires that contraceptives must be made available to indigent minors regardless of age. There is no such mandate with reference to minors who are not indigent. Such a distinction, based on economic status, bears no relationship to the purposes allegedly underlying the statute and denies equal protection to non-indigent minors.

The provisions of the New York statute which prohibit the sale of contraceptives except by a licensed pharmacy likewise violate rights guaranteed by the Fourteenth Amendment. The State's argument that limiting access in this way is necessary to support the other provisions of the statute must fall with the provisions they are supposed to support. Moreover, the restriction is overbroad in that

it limits the access of all citizens, not only minors, to contraceptive products. Nor does the limitation on sales to pharmacies serve the alleged purposes of: preventing minors from selling contraceptives; preventing tampering with contraceptive products; or providing the benefit of the alleged expertise of pharmacists to consumers. Minors do work in pharmacies and sell non-prescription products. A much more narrowly drawn statute could regulate tampering. Citizens wishing to utilize the expertise of a pharmacy can do so whether or not the sale of contraceptives is limited to pharmacies and, in any event, the State has offered no support for its assumption that licensed pharmacists have any particular expertise in the area of contraception.

The statute's prohibition of the advertisement of contraceptive products violates the appellees' First Amendment rights as guaranteed by the Fourteenth Amendment. As this Court recently made clear, such advertisement is speech protected by the First, through the Fourteenth, Amendment. The State may not suppress dissemination of such commercial speech of clear public interest on the ground that it may be offensive to some members of its citizenry. Such a prohibition constitutes the kind of censorship which this Court has consistently held unconstitutional in its decisions in the areas of obscenity, of political speech and more recently of commercial speech.

ARGUMENT

POINT I

The New York statute's ban on the sale or distribution of non-prescription contraceptives to minors under sixteen violates the fundamental constitutional rights of such minors.

A. The State has no compelling interest which would overcome the minors' constitutional right of privacy.

In line with the subsequent July 1, 1976 decision of this Court in *Planned Parenthood of Central Missouri* v. *Danforth* (96 Sup. Ct. 2831), the District Court in its decision herein held the right of privacy recognized by the Court in *Roe* v. *Wade* (410 U.S. 113 (1973)), and *Doe* v. *Bolton* (410 U.S. 179 (1973)) applicable to minors as well as to adults. Specifically, the District Court held that the privacy right at issue here, access to contraceptives, is "an aspect of the right of privacy, that is, a right encompassed within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment" and applies to minors under sixteen. 398 F. Supp. at 331.

The District Court further found that the provisions of the New York statute prohibiting the sale or distribution of contraceptives to minors under sixteen are unconstitutional under the test set forth in *Boraas* v. *Village of Belle Terre* (476 F.2d 806, 814-15 (2d Cir. 1973), *rev'd on other grounds,* 416 U.S. 1 (1974)) in that its provisions are not sufficiently related to a legitimate state interest to justify the infringement of minors' constitutional rights. Because it found the New York statute unconstitutional even under this less stringent test, the Court did not find it necessary to

reach the question of whether the right of access to contraceptives is a fundamental one which may be infringed only when there is a compelling state interest in the subject matter of the statute. For the reasons set forth herein, *amici* contend not only that the Court below was correct in holding the New York statute unconstitutional under the *Boraas* test, but also that the right of minors to have access to contraceptives is a fundamental one which may not be infringed in the absence of a compelling state interest.

This Court has already indicated that it considers access to contraceptives to be a "fundamental human right." *Eisenstadt* v. *Baird* (405 U.S. 438 (1972)). And clearly the right to use contraceptives as recognized in *Griswold* v. *Connecticut* (381 U.S. 479 (1965)) would be meaningless if the State could effectively prevent use by restricting distribution. The State seeks to avoid the reasoning of the *Eisenstadt* decision by arguing that the statute does not prevent teenagers under sixteen from obtaining contraceptives; it merely requires that they see a doctor prior to obtaining them. As a practical matter, however, this requirement will in fact prevent many teenagers from obtaining contraceptives. There are still many doctors who hesitate to serve teenagers without parental consent because of an unfounded fear of recoveries against them in civil damage suits, even though parental consent is, as appellants point out, not required under New York law for distribution of contraceptives by physicians to minors. Moreover, many teenagers do not have money enough to see a doctor or may be embarrassed to discuss contraceptives with a doctor or believe the doctor will inform their parents. Finally, the embarrassment of being

refused contraceptives on the basis of their age may discourage teenagers under, and even some over, sixteen from attempting to purchase them. While it might actually be preferable to have every sexually active teenager consult with a physician regarding contraceptives, the sad reality is that unless contraceptives are available over the counter, thousands of young people will simply not get them, will engage in unprotected sexual activity and will be exposed to the risk of unwanted pregnancies, venereal disease and untold medical and social costs. The provisions of the statute thus will infringe on this fundamental right of many teenagers. To justify such infringement the State must be able to show more than that the statute in question bears some rational relationship to legitimate state purposes (Brief for Appellants, at p. 14). The State has failed to show even a rational relationship, much less a compelling state interest.

Having admitted below that "there is no evidence that teenage extramarital sexual activity increases in proportion to the availability of contraceptives . . .", the State now attempts to argue that even though the availability of contraceptives does not increase sexual activity, teenagers will view the lack of a prohibition on sales to minors as a sanction by the State to engage in sexual intercourse and will thereby be encouraged to do so. (Brief for Appellants, at 17). This academic twist to the familiar and discredited position regarding availability is supported neither by logic nor by the facts.

New York is the only state in the union which has a statute prohibiting the sale of nonprescription contracep-

tives to minors,* yet figures relating to out-of-wedlock births and abortion indicate that the incidence of teenage extramarital sex in New York is actually higher than in the nation as a whole. From 1971 to 1974 while the ban on sale and distribution to those under sixteen was in effect, for example, pregnancies among minors in New York increased by 25½%. In 1974 alone, the incidence of pregnancy among New York State girls increased by 29% for thirteen-year-olds, 42% for fourteen-year-olds and 30% for fifteen-year-olds (N.Y. State Coalition for Family Planning). Clearly the statute has in fact had no deterrent effect on sexually active teenagers under sixteen.

Nor is this surprising. Studies relating to the impact of legislation on teenage sex shows that teenagers are generally not even aware of such laws. As one report concluded:

> "Young people do not deliberately violate the law in matters of sex; they simply consider laws about sex irrelevant to their personal behavior." Sorensen, *supra*, at 93.

The Sorensen Report further found that the primary reason teenagers do not engage in sexual intercourse is not because of lack of availability of contraceptives or of parental or social sanction, but rather because they are not ready for it or have not yet met the right person (*Id.* at 13-19, 194).

In addition to studies which directly refute the State's contention that permitting the sale of contraceptives to

* *Family Planning, Contraception and Voluntary Sterilization: An Analysis of Laws and Policies in the United States, Each State and Jurisdiction*, A Report of the National Center for Family Planning Services 76 (DHEW Pub. No. (HSA) 74-16001, 1974).

teenagers will encourage teenage sexual activity, there is impressive documentation of the fact, which the State itself admits, that most sexually active teenagers do not use contraceptives until after they have been sexually active for a period of time (Brief for Appellants, at 18).* The vast majority of teenagers who do use contraceptives are thus no longer susceptible to the deterrent value, if any, of learning that the state legislature "disapproves" of their activities.

The State's argument is also refuted by its own admission that availability of contraceptives does not increase the incidence of teenage sex. For availability clearly implies State sanction either through lack of regulation or failure by the State to enforce the existing law.

Finally, any disapproval implicit in the statute is counteracted by the existence of Sections 350.1(e) and 365-a.3 (c) (as amended 1974) of the New York Social Services Law which provide for distribution of contraceptives to eligible "persons of childbearing age including children under twenty-one years of age who can be considered sexually active." Although the State contends in its Brief (*see* footnote, at 15) that these sections mean that contraceptive products must be made available *through physicians* if the person is less than sixteen years of age, there is no reference in either section to such a requirement, the only criteria for such service being sexual activity and the wishes of the child. Nor does the Administrative Letter (73 PWD-186) issued

* The State suggests that the fact that many teenagers would not purchase contraceptives, even if available, minimizes the impact of the statute. That all do not take advantage of their rights is, however, no reason to deny those who wish to do so the opportunity and to force them to take the risk of unwanted pregnancy.

by the New York State Department of Social Services pursuant to Section 350.1(e) refer to the necessity of dispensing contraceptives through a physician. The directive simply states that:

> "each social service district shall offer, and provide promptly upon request, in accordance with this Section, family planning services to the following groups *including minors who can be considered sexually active*: income maintenance recipients; medically needy only recipients of childbearing age; and Supplementary Security Income claimants of childbearing age." [emphasis supplied].

Further the Administrative Letter provides that:

> "each foster family parent providing care for an adolescent (12 years of age and up) shall be advised in writing of the availability for each adolescent of family planning services, within 30 days after assuming care of such adolescent . . ."

Another state program which mandates that contraceptives be supplied to persons under sixteen is the program of Medical Assistance for Needy Persons (Medicaid), established under Article 5, Title 11 of the Social Services Law. Section 363-a of that law provides that a plan for implementing such assistance must conform with requirements of Title XIX of the Federal Social Security Act (42 U.S. C. Section 1396 *et seq.*). Each public welfare district is required to furnish medical assistance to the persons eligible therefor who reside in its territory. Social Services Law Section 365.

"Medical assistance" is defined by statute to include "family planning services and supplies for eligible persons

of child-bearing age including children under twenty-one years of age who can be considered sexually active, who desire such services and supplies, in accordance with the requirements of federal law and the regulations of the department." Social Services Law Section 365-a.3(c) (as amended 1974).

This Section, like Section 350.1(e) of the Social Services Law makes no mention of any requirement that such services and supplies be dispensed by a physician.

In contrast to the substantial documentation which refutes any notion that such a meaningless state sanction as the statute here involved will discourage teenage sex, the State offers in support of its argument a single quotation contained in an article on another subject. On the basis of this statement it asserts there is a legitimate state interest in a law purporting to limit the access of contraceptives to sexually active teenagers under sixteen.

This hypothetical benefit of the statute must be balanced against the very real and documented hazards which are being incurred as a result of the restriction it imposes on minors' access to contraceptives. The statistics on sexual activity among teenagers under the age of sixteen are impressive. In 1974 through 1975, 24% of all fifteen-year-old girls, 17% of all fourteen-year-olds and 10% of all thirteen-year-olds were sexually active. The Alan Guttmacher Institute, *Eleven Million Teenagers: Teenage Sexuality, Pregnancy and Childbirth, The Problem, The Consequences, The Programs.* (To be published in the fall of 1976).

In a period of otherwise declining birth rates, out-of-wedlock births in the United States for teenagers have continued to increase, and the increase has been especially significant for younger teenagers, rising 75% from 1961 to 1974 in the fourteen to seventeen-year-old age group. *Id.* at I.8. See also, *National Center for Health Statistics, DHEW* (NCHS), *Interval Between First Marriage and Legitimate First Birth, United States, 1964-66,* 18 MONTHLY VITAL STATISTICS REPORT, No. 12 (Supp. 1970); NCHS, *Summary Report, Final Natality Statistics,* 1969, 22 MONTHLY VITAL STATISTICS REPORT, No. 7 (Supp. 1973); and P. Cutright, "Illegitimacy in the United States", 1920-1968, in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth,* C. F. Westoff and R. Parke, Jr. (Eds.), Vol. 1 of Commission Research Reports, 1972, at 375.

These statistics represent disastrous consequences for many teenage girls and for their infants. The medical risks associated with pregnancy are significantly higher for women under twenty and increase dramatically with decreasing age. The maternal death rate from complications of pregnancy, birth and delivery for teenagers under the age of fifteen is 1.6 times that of women in their early twenties. Moreover, teenagers under the age of fifteen are 3½ times as likely to die as a result of toxemia associated with pregnancy. Alan Guttmacher Institute, *supra,* at II.16. Infant mortality and medical risks are also considerably higher for babies born to teenagers in the younger age groups. For first babies, the infant mortality rate during the first year is 3.3 times higher for babies born to teenagers under fifteen than to women in their early twenties. The mortality

rate during the first year for all babies born to women ten to fourteen years of age is 2½ times the mortality rate for infants of women over twenty. Low birth weight, a major cause of childhood illness and birth injuries including neurological defects, as well as of infant mortality, is also more common in infants born to young teenagers than to women in their early twenties. For teenagers under fifteen the incidence of low birth weight is 2½ times greater. *Id.* at II.15, II.16. *See also,* J. A. Menken, "Teenage Childbearing: Its Medical Aspects and Implications for the United States Population", in Commission on Population Growth and the American Future, *Demographic and Social Aspects of Population Growth,* C. F. Westoff and R. Parke, Jr. (eds.), *supra,* at 331. *See* Day, *Factors Influencing Offspring,* 113 AM. J. DISEASES OF CHILDREN 179 (1967); Daniels, *Medical, Legal and Social Indications of Contraceptives for Teenagers,* 50 CHILD WELFARE 150 (1971); Wallace, *Teenage Pregnancy,* AM. J. OBST. & GYNEC. (Aug. 15, 1965); Grant, *Biologic Outcomes of Adolescent Pregnancy: An Administrative Perspective,* in Johns Hopkins Univ. School of Hygiene and Public Health, PERSPECTIVES IN MATERNAL AND CHILD HEALTH (1970).

The social consequences of unwanted pregnancy for a teenage girl can be equally disastrous. As the Court pointed out in *Poe* v. *Gerstein* (517 F.2d 785, 791 (5th Cir. 1975)):

> "Teenage motherhood involves serious consequences, adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school and numerous other social dislocations."

In addition to the emotional impact of an unwanted pregnancy, statistics indicate that the rate of school drop-out and unemployment is significantly higher among women who give birth in their teens. Alan Guttmacher Institute, *supra,* at II.18, II.19 and II.20. There are social consequences for the child as well, who has a greater chance of being physically abused or neglected if it survives. Gil, *Violence Against Children—Physical Child Abuse in the United States* 109 (Harvard University Press 1970) (9.29 percent of abusing mothers in 1957 were younger than twenty years of age); U.S. Bureau of the Census, Current Population Reports, Previous and Prospective Fertility: 1967, 29, Series P-20, No. 211 (only 2.4% of mothers fourteen to forty-four were younger than twenty).

In the light of these serious consequences, an attempt to discourage promiscuity by prohibiting the sale of contraceptives on the unsupported theory that the state disapproval therein implied will discourage sexual activity can only prove illusory and harmful.

B. The prohibition denies minors under sixteen the equal protection of the laws guaranteed by the Fourteenth Amendment.

Since the Legislature has authorized contraceptive services for needy teenagers under the age of sixteen under Sections 350.1(e) and 365-a.3(e) of the Social Services Law without the intervention of a physician, New York law permits economically disadvantaged teenagers to exercise their constitutionally protected right to have access to birth control, but denies the exercise of that same constitutionally protected right to more affluent young people.

Such an arbitrary classification cannot withstand attack under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause denies to states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Eisenstadt* v. *Baird, supra,* at 446. A classification "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), *quoting, Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920).

In *Eisenstadt* v. *Baird, supra,* this Court invalidated a Massachusetts law which forbade the distribution of contraceptives to unmarried persons on the ground that the Equal Protection Clause precludes a classification based on marriage which bears no rational relationship to the object of the statute. Appellees rely on this case in support of their argument that any statutory classification based solely on age with regard to the distribution of contraceptives is a denial of equal protection. *Amici* agree. But we make the additional argument that a distinction between indigent young people and affluent young ones would similarly be barred by the Equal Protection Clause.

In *Griswold* v. *Connecticut* (381 U.S. 479 (1965)), this Court invalidated a Connecticut statute forbidding the use of contraceptive drugs or devices. In his concurring opinion, Mr. Justice White said:

> "[T]he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those with-

> out either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment." *Id.* at 503 [citations omitted].

Mr. Justice White's reasoning presents the converse of the situation now before this Court. Under the New York law, as construed by the plaintiffs, the right to obtain contraceptive supplies is withheld from affluent young people for reasons of economic status. There can be no rational connection between their (or their parents') economic status and the availability of contraceptives to them. While the State can certainly render services to welfare recipients which it does not render to others, it cannot constitutionally withhold from the others access to the identical services for which they can afford to pay. The right of access to effective contraceptives should not and cannot be a function of affluence or poverty.

POINT II

The New York statute's prohibition on the sale or distribution of contraceptives except by licensed pharmacies or physicians violates the constitutional rights of New York citizens as guaranteed by the Fourteenth Amendment.

As was pointed out by the Court below, the limitation of the sale or distribution of non-prescription contraceptives to licensed pharmacists clearly restricts access to these products. 398 F.Supp. at 334. In support of this restriction the State suggests three rationales: (1) the restriction

will assure that only persons of mature years will be involved in the sale of such products; (2) the restriction will permit purchasers to inquire as to the relative qualities of the varying products and will prevent anyone from tampering with them; and (3) the restriction will enable the State to police that part of Section 6811(8) which forbids display of contraceptive products in licensed pharmacies and sales to minors under sixteen. As set forth in Point I, *supra,* and Point III, *infra,* the State may not constitutionally so restrict sales to minors under sixteen or forbid advertising and display of contraceptive products. Any rationale resting on these provisions of the statute must therefore fail. Moreover, even if the State could justify these restrictions, the provisions seeking to enforce them by limiting sales to licensed pharmacies would be overbroad in that they restrict the access of all citizens, not just minors under sixteen, to contraceptive products. The State contends that this is necessary to facilitate the enforcement of these restrictions. However, as the Court below correctly pointed out, increased administrative inconvenience or burden is no justification for infringing constitutional rights. 398 F.Supp. at 335.

Nor can these restrictions be justified on the other two grounds suggested by the State. With respect to the argument that young people will not be forced to sell contraceptives, if this indeed is a reason for the enactment of the restriction on sale to pharmacies, it fails of its purpose. New York law does not restrict the employment of minors in pharmacies; it merely requires that a licensed pharmacist prepare prescription drugs. In many cases, young people are in fact employed in pharmacies to sell the many

non-prescription items, including contraceptives which are sold there. If it was the intention of the Legislature to require that persons selling contraceptive products have attained a certain age, it could have enacted a statute to this effect. The present provision not only fails to achieve this result, but is overbroad in that it prevents anyone, regardless of age, who is not employed by a licensed pharmacy, from selling such products and does not prevent minors employed in licensed pharmacies from selling them.

Finally, as this Court has already made clear in *Eisenstadt* v. *Baird, supra,* imposing such a restriction in order to permit purchasers to inquire as to the relative qualities of varying products and to prevent anyone from tampering with them, is "both discriminatory and overbroad." In that case, the State of Massachusetts attempted to support a similar restriction on the ground that the purpose of the amendment was to "serve the health needs of the community by regulating distribution of potentially harmful articles." Noting that not all contraceptives are potentially dangerous and that there are many state and federal laws already in existence regulating the sale and distribution of harmful drugs, the Court there held that the health rationale was inadequate to support the infringement on the right of the citizens of Massachusetts to have access to contraceptives. 405 U.S. at 450.

If the State cannot constitutionally restrict access to contraceptive products on the ground that such a restriction is necessary to protect the health of its citizens, it surely cannot impose such a restriction in order to permit consumers to inquire as to the relative quality of the varying products and to prevent anyone from tampering with them. As the District Court pointed out, the State has offered no evidence to suggest that pharmacists may have unique training or qualifications with regard to giving advice about contraception. And as Chief Justice Burger pointed out in his concurring opinion in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, —— U.S. ——, 48 L.Ed.2d 346, 365 (1976), even in dealing with prescription drugs:

> "Roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. . . . In dispensing these items, the pharmacist performs three tasks: he finds the correct bottle; he counts out the correct number of tablets or measures the right amount of liquid; and he accurately transfers the doctor's dosage instructions to the container. Without minimizing the potential consequences of error in performing these tasks or the importance of the other tasks a professional pharmacist performs, it is clear that in this regard he no more renders a true professional service than a clerk who sells lawbooks."

With respect to non-prescription contraceptives, the role of the pharmacist is even less; his sole function is to hand the customer the correct item and collect the price. And this task may be performed either by a pharmacist or by any of the sales clerks working for him. Anyone seeking advice, assuming that a pharmacist would be qualified to give it, regarding the relative merits of the contraceptive would have to seek out the pharmacist. And this is true whether sales are restricted to pharmacies or whether such products are available in other retail outlets as well. More-

over, as the District Court noted, in exempting proprietary medicines, such as aspirin, cough syrups, decongestants and the like from the requirement that sales be limited to pharmacies the Legislature has recognized that there is no necessity for such restriction with respect to prepackaged, non-prescription items. N.Y. Education Law, Section 6807(c). Certainly there is no basis for distinguishing these items from non-prescription contraceptives in terms of the value of having a pharmacist available to answer questions which the consumer might have.

The suggestion that the restriction on sales to licensed pharmacies is necessary to prevent tampering with the contraceptive is subject to similar objections. The State has not distinguished between devices which might be injured by tampering and those which would not. If fear of tampering were the object of the statute, the State could enact laws directly related to those specific problems which may arise with respect to certain products, or regulate the handling of such products. As was pointed out by the Court below, while there may be valid regulations which the State could enact in this area, the blanket prohibition on sale of such products by outlets other than licensed pharmacies is overbroad, unconstitutional in and of itself, and insufficient to overcome the constitutional infirmities of the statute.

POINT III

The New York statute's prohibition of advertisement or display of contraceptives violates the appellees' First Amendment rights as guaranteed by the Fourteenth Amendment.

In its May 24, 1976 decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* the Supreme Court squarely held that a statute prohibiting the advertisement of a consumer product, in that case a prescription drug, violated the constitutional rights both of advertisers and of consumers of the product under the First and Fourteenth Amendments to the U.S. Constitution. Both the holding and reasoning of that case are directly applicable to the provision of that part of Section 6811(8) of the New York Education Law which prohibits, without exception, the advertisement or display of contraceptive products.

The Court held in the Virginia case that speech which "does no more than propose a commercial transaction" is protected by the First Amendment, on the ground that

> "Society . . . may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial' may be of general public interest." 48 L.Ed. 2d at 360.

Clearly, society does have a strong interest in the availability, relative merits and prices of contraceptive products.

The State seeks to justify the provisions of Section 6811(1) relating to advertising and display on the ground that:

> "Section 6811(8) limits only commercial advertisement of contraceptive products and is not overbroad." (Brief for Appellants, at 23)

Without conceding that the statute is limited as the State argues, *Virginia State Board of Pharmacy, supra,* disposes of the argument that a purely commercial advertisement lacks First Amendment protection.

Moreover, Section 6102(19) of the New York Education Law defines "advertisement" broadly to include

> "*all representations* disseminated in *any manner or by any means,* other than labeling, for the purpose of inducing or which are likely to induce, *directly or indirectly,* the purchase of drugs, devices or cosmetics" [Emphasis supplied].

Even were commercial speech not entitled to the protection of the First Amendment, the ban on advertising contained in Section 6811(8) would run afoul of the First and Fourteenth Amendments. This language is broad enough to encompass educational material urging the use of contraceptives, material clearly of public interest and of a non-commercial nature. Such material even if contained in an advertisement is in any event protected by the First Amendment. *Bigelow* v. *Commonwealth of Virginia,* 421 U.S. 809 (1975); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964).

The State contends, however, that the statute is reasonable because it reflects "a legitimate legislative concern

that individuals not be exposed to displays and advertisements which may be offensive and embarrassing to many . . . [and that displays and advertisement of contraceptive products] will lead to legitimization of sexual activity on the part of young children of New York State and increased promiscuity." (Brief for Appellants, at 24.) Assuming that these are in fact legitimate concerns, neither is sufficiently compelling to overcome the First Amendment protection afforded to advertisements which are themselves constitutionally protected and which in addition relate to a constitutionally protected right. Moreover, the statute is overbroad in that it affects all advertisements of contraceptives regardless of content or method or extent of dissemination. The State is in effect arguing that protecting the sensibilities of a few individuals, who may be offended by the mere mention of the subject of contraceptives, justifies a complete suppression of communication of material of general public interest. The long line of decisions of this Court in the area of obscenity makes clear that this is not the case. And much speech of a political nature or of social interest which is clearly protected by the First Amendment may be extremely embarrassing or offensive to some people. That possibility has never justified censorship of the kind contained in Section 6811(8).

As this Court observed in *Virginia State Board of Pharmacy, supra*:

> "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude

that the answer to this one is in the negative." 48 L. Ed. 2d at 365.

Nor can the prohibition be justified on the ground that it will prevent promiscuity. If access to contraceptives has no effect on promiscuity (see POINT I, *supra*), it is difficult to understand how exposure to advertising could have such an effect. And, in any event, the prohibition of advertising goes beyond prohibition of advertising to teenagers, it extends to all advertising regardless of content, context, taste or method or extent of dissemination. This is not a "mere time, place and manner restriction" (*Virginia State Board of Pharmacy,* 48 L.Ed. 2d at 363); it is an absolute prohibition on communication of speech protected by the First Amendment which the State attempts to justify on the ground that such communication may be harmful to certain elements of the population. The State has thus chosen to let the possibility of harm to a few (which it has in no way established) override the legitimate interest of the majority of its citizens in receiving such information. But, as this Court pointed out in *Bigelow,* this choice is not the State's to make. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 363.

As in the case of the restriction on sale and distribution to minors under sixteen, the State, without adducing any data to this effect, attempts to justify its infringement of First Amendment rights on the ground that the prohibition on advertising and display will discourage promiscuity.

Again, the entirely hypothetical benefit to be gained cannot and does not justify the infringement of a fundamental constitutional right.

Conclusion

For the reasons stated in this brief and in the brief of the Appellees, *amici* respectfully urge that this Court affirm the judgment of the three-judge court below.

October 1, 1976

Respectfully submitted,

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amicus brief

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-443

HUGH CAREY, et al.,

Appellants,

v.

POPULATION SERVICES INTERNATIONAL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The American Civil Liberties Union is a private, nonprofit membership corporation engaged solely in defense of the Bill of Rights. During its fifty-six years, the ACLU has devoted substantial effort to protecting the rights guaranteed by the First Amendment, in protecting the rights of juveniles from arbitrary and irrational invasion by the

State, and in facilitating access to all methods of contraception. These several areas coalesce in this case because of the New York state statute involved.

In this brief we demonstrate through reliable statistical and empirical evidence that interference with the ability of minors under sixteen freely to procure non-prescription contraceptive devices, takes an unacceptable medical and social toll.

Statute Involved

New York State Education Law § 6811(8) (McKinney 1972)

"It shall be a class A misdemeanor for:

8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of conception to a minor under the age of

sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

Argument

The Conceded Absence of Proof That Section 6811(8) Serves the State's Asserted Interest in Discouraging Sexual Activity by Minors, Leaves Intact the Right of Privacy of Minors in the Area of Reproductive Freedom Sought to Be Regulated by Sec. 6811(8), and Requires That it Be Declared Un-Constitutional.

The State of New York attempts to justify its statutory prohibition against the sale of contraceptive devices to minors under the age of sixteen without a physician's prescription, by asserting that it serves a valid state purpose of discouraging sexual activity by those children. Brief of Appellant, pp. 15, 16-18, 21. The state advances this justification in the teeth of its concession below that "there is no evidence that teen-age extramarital sexual activity increases in proportion to the availability of contraceptives." 398 F. Supp. 321, 332. (Cf. Brief for Appellant 21.) Indeed, not only is there no evidence

to support the State's asserted justification, there is a wealth of evidence which leads irrevocably to the conclusion that the real consequences of the State's policy disserve the interests protected by the constitutional right of privacy because they inflict devastating medical and social injury upon the private lives of affected minors. See Planned Parenthood v. Danforth, U.S. (1976). This brief is confined to a description of that evidence.

Pregnancy and Abortion

The rate of live births among minors in New York State is staggering. In New York City alone there were 5,992 live births to girls between 15 and 17 in 1975, and 395 live births to girls under the age of 15.[1/] Statewide, there were 626 live births in the under 15 age group in 1974. But live births reveal only a fraction of the pregnancy rate in the minor population. Thus, in 1975, there were 13,486 pregnancies among girls

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1/ Unless otherwise noted, all 1974 and 1975 New York City and State statistics cited in this brief were secured from Ms. Frieda Nelson, Research Analyst, Bureau of Maternity Services and Family Planning, New York City Department of Health. The letters containing that statistical information have been filed with the Clerk of the Court.

13 to 16 throughout the state.[2/] The discrepancy between pregnancy and live births is accounted for in 1975 by the 9,805 abortions performed in New York City on girls between 15 and 17 and the 1,136 abortions performed on girls under 15. The abortion rate among girls under 16 has now exceeded the live-birth rate for that age group.

Mortality

Special medical risks to the young girl and the infant she bears are much higher than for older mothers. The risk that infants born to very young mothers will be stillborn or die soon after birth is extremely high. In New York City in 1974, of 6,456 live births to women 17 and younger, there were 180 infant deaths. Females under the age of 15 had the highest ratio of infant mortality per 1,000 live births, 42.1 as contrasted to 13.6 for women between the ages of 25 and 29, and 27.0 for women between the ages of 15 and 17. The data strongly suggests that the high infant mortality rate among young mothers is directly related to the immature biologic development of the mother

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2/ New York State Health Department, Bureau of Family Planning, Pregnancy Trends Among Teen-agers, New York State, 1971-1975.

rather than to external environmental factors.[3]

The chance of survival of infants born to mothers under 16 is reduced even further by the fact that the vast proportion of them are born out-of-wedlock. In 1975, of the 5,992 live births to New York City girls between 15 and 17, 4,756 were out-of-wedlock. In the same year, 375 out of the 395 births to New York City girls under 15 were illegitimate. Virtually all of the pregnancies in the under 16 group were conceived out-of-wedlock and only a very small percent were legitimated by marriage in the course of pregnancy.[4]

New York City and other[5] statistics

3/ Gordon, S., The Sexual Adolescent (Duxbury Press, 1973).

4/ Zelnick and Kantner, "The Resolution of Teen-age First Pregnancies," Family Planning Perspectives, Vol. 6, No. 2 (Spring, 1974), p. 79.

5/ Shapiro, Schlesinger, Nesbit, "Infant, Prenatal, Maternal and Childhood Mortality in the United States," Harvard University Press, 1968, p. 10; NCHS, "Infant Morality Rates by Legitimacy Status: United States, 1964-1966," Monthly Vital Statistics Report, Vol. 20, No. 5, 1971.

clearly establish that infant mortality is much higher for illegitimate children. In 1974, the infant mortality rate for illegitimate babies was 26.5 per 1,000, while the rate for legitimate babies was 14.0 per 1,000. This is attributable partly to the fact that unmarried pregnant women are less likely to obtain proper prenatal care and also to the postnatal environment of the unwed mother which is commonly less than satisfactory.[6]

Infants of very young mothers who do survive are much more likely to suffer serious mental and physical defects. Statistics demonstrate that the percentage of infants who are of low birth weight (less than 2,500 grams[7]) is substantially higher for those born to young teen-age mothers than to older women. New York City statistics for 1975 establish that 14.4 percent of infants born to mothers under 15 weighed

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6/ Population and the American Future, Report of the Commission on Population Growth and the American Future, p. 145.

7/ Low birth weight is associated with a variety of problems, including mental retardation, epilepsy and cerebral palsy. Menken, "The Health and Social Consequences of Teen-age Childbearing," Family Planning Perspectives, Vol. 4, No. 3 (July 1972), p. 50 n. 42 and sources collected therein.

less than 2,500 grams, compared to 9.1 percent of infants born to all other mothers.

Venereal Disease

There is a high incidence of venereal disease among young people which could be prevented by the use of condoms. In 1975, 303 cases of gonorrhea and syphilis were detected in youngsters under the age of 15 in New York City. For the 15-19 age group, 8,350 cases of gonorrhea and syphilis were reported. Indeed, in response to these alarming venereal disease data, New York State law has been amended to permit physicians to treat minors of any age for venereal disease regardless of their parents' knowledge or consent.[7a] The elimination of any age requirement for treatment underscores the irrationality of the statute challenged in this case, which rejects the right of young people to prevent the disease which they have the right to cure.

Education

Quite apart from medical hazards, early childbearing means yet another generation of poverty and lost opportunity for both mother and child. Arthur Campbell has observed about the young teen-age mother:

> Suddenly she has 90 percent of her life's script written for her. She

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7a/ New York Social Services Law, §350(1)(e).

> will probably drop out of school, even if someone else in her family helps to take care of the baby; she will probably not be able to find a steady job that pays enough to provide for herself and her child; she may feel impelled to marry someone she might not otherwise have chosen. Her life choices are few, and most of them are bad. Had she been able to delay the first child, her prospects might have been quite different.[8]

In New York City alone the Board of Education estimates that approximately 3,000 to 3,500 girls of school age became pregnant in the school terms between 1972 and 1974.[9] Despite the fact that alternative educational programs have been available since 1968,[10] the estimated dropout rate due to pregnancy is nonetheless

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8/ "The Role of Family Planning in the Reduction of Poverty," Journal of Marriage and the Family, 30:236, 1968.

9/ Conversation with Mrs. Ruby Day, Schools for Pregnant Girls, New York City Board of Education, and Mr. Brown, Statistical Accounting, New York City Board of Education.

10/ Education of Pregnant Students, Special Circular No. 10, Board of Education of the City of New York (1968-69).

high.[11] Indeed, pregnancy is the number one school dropout cause among females in the United States.[12]

Poverty

Another indicator of the poverty that envelops the teen-age mother is the fact that a large proportion of them require public assistance.

In 1960, among mothers under 15 years old, 92 percent delivered on general hospital ward service. Of the 15-19 year olds, 73.7 percent gave birth on general service. In contrast, only 39 percent of mothers in their twenties delivered on general ward service. With the advent of Medicaid, the rising number cared for on general service was reduced or slightly reversed. Thus, in 1973, 81 percent of mothers under 15 years delivered on general service and 73.9 percent of mothers 15-19 years of age delivered on general service, but only 39.5

11/ See, Population Commission, Report, p. 145-146. The New York City Board of Education has announced the closing of the city's five special schools for pregnant girls. New York Times, September 25, 1976. Inevitably, the dropout rate will increase.

12/ Gordon, supra, p. 33.

percent of mothers in their twenties delivered on general service. It is thus apparent that teen-agers may be physically capable of bearing children but financially incapable of caring for them. In the great majority of cases they must rely on the community for support.[13]

Illegitimacy

In addition to poverty, illegitimacy continues to be a condition subject to great disabilities. Although this Court has rejected discrimination against illegitimate children in a variety of contexts,[14] some disabilities persist.[15] In New York, for example, inheritance rights are entirel

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13/ Pakter, Jean, M.D., M.P.H., O'Hare, Donna, M.O., and Nelson, Frieda, B.A., "Teenage Pregnancies in New York City: Impact of Legalized Abortions." Paper presented at the 102nd A.P.H.A. Annual Meeting, October 23, 1974, New Orleans, La., Table IIA.

14/ See, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974).

15/ Labine v. Vincent, 401 U.S. 532 (1971).

contingent upon a judicial order of filiation entered within two years of the child's birth. Enforceability of support also requires such a filiation order within two years of bith or within two years of a voluntary payment.[16] Moreover the stigma of illegitimacy persists and the loss of self-esteem of illegitimate children, and their poor social performance, have been documented.[17]

Divorce

When pregnant teen-agers do marry, they are three times as likely to divorce as those who enter marriage at a more mature age:

> The highest divorce rate in the United States is among teen-agers. Half of the women who become mothers for the

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16/ See New York Fam. Ct. Act, §517; New York Estates, Powers & Trust Law, §4-1.2; In re Estate of Crawford, 315 N.Y.S. 2d 890 (Sur. Ct., Chautauqua Co., 1970); In re Estate of Hendrie, 326 N.Y.S. 2d 646 (1971); In re Estate of Belton, 335 N.Y.S. 2d 177.

17/ See Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 Am. J. Sociology 169 (1958).

> first time do so before age 21. More than 50 percent of the marriages of high school girls occur when the girl is pregnant. The rate increases to 80 percent when the boy involved is also a high school student. Divorce rates run three times higher in teen-age marriages compared with those consummated between ages 21 and 45.[18]

Though, as stated, appellant justifies the statute at issue here on the ground that it deters young people from engaging in sexual intercourse on the assumption that the fear of pregnancy is an effective deterrent to intercourse, evidence shows that a teen-ager's decision to refrain or not from intercourse is unrelated to the use of contraception. A recent Los Angeles study[19] involved 502 unmarried, never pregnant girls between the ages of 13 and 17 who were seeking contraception for the first time at five different Los Angeles clinics.

18/ Lieberman, J., "Behavior Resarch in Population Planning," Professional Psychology 1, no. 3 (Spring 1970); Gordon, supra, p. 34.

19/ Settlage, Baroff, Cooper, "Sexual Experience of Younger Teenage Girls Seeking Contraceptive Assistance for the First Time." Family Planning Perspectives, Vol. 5, No. 4 (Fall, 1973).

No such patient was excluded from the study and the sample transcended racial and socioeconomic lines. Girls from welfare families were slightly underrepresented in the sample and girls from families with an income in excess of $20,000 were slightly overrepresented.

The study revealed that 96 percent of the girls were already sexually active when they came for contraception and 58 percent had been active for over a year. The inescapable inference from this data is that the request for contraception follows established sexual practices and does not stimulate it. In another carefully developed study[20] based on a national probability sample of 411 adolescents aged 13 to 19, those youngsters who were virgins gave three major reasons for never having any sexual experiences. In the order agreed to by all virgin adolescents, the reasons were:

> Because I'm not ready for it;
>
> Because I haven't met a girl/boy who I would want to have sex with;
>
> Because I haven't met a girl/boy who wants to have sex with me.

20/ Sorenson, R. C., Adolescent Sexuality in Contemporary America, (New York, World Publishing Co., 1973), p. 166.

The fear of pregnancy is apparently not a deterrent to youngsters who are otherwise disposed to begin sexual activity. Thus the authors of the Los Angeles study conclude that, "[c]learly, the decision to have intercourse was unrelated to contraceptive use.[21]

There is, moreover, no reliable evidence to support appellant's suggestion that teen-agers who engage in sexual intercourse would not use contraception even if they had access to it.[22] On the contrary, several recent studies of teen-age sexuality reveal that a large number of young teenagers appreciate the serious consequences of out-of-wedlock birth and would and do use contraception if and when it is available.[23] Several of these studies involved

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21/ Settlage, Baroff, Cooper, supra.

22/ Defendants' memorandum of law in opposition to Plaintiffs' motion for a three-judge court, pp. 23-24.

23/ Furstenberg, Frank, Gordis, "Birth Control Knowledge and Attitudes Among Unmarried Pregnant Adolescents: A Preliminary Report." Journal of Marriage and the Family, 31:34-42 (1969); Gobble, Vincent, Cochrane & Lock, "A Non-Medical Approach to Fertility Reduction," American Journal of

the distribution of free condoms to hundreds of adolescent males from inner city ghettos. They conclude that adolescent males, if given the opportunity, will share responsibility for pregnancy prevention and that "condoms are acceptable to adolescents in a magnitude previously unappreciated."24/

Footnote 23 Cont'd

Obstetrics and Gynecology, 34, 6:888-91 (December 1969); Arnold & Cogswell, "A Condom Distribution Project for Adolescents," American Journal of Public Health, 61:739-50 (April, 1971); Arnold, "Sexual Behavior of Inner City Adolescent Condom Users," Journal of Sex Research, Vol. 8, No. 4, pp. 298-309 (Nov. 1972).

24/ Arnold, supra.

Conclusion

For the reasons set out above, the decision below should be affirmed.

Respectfully submitted,

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